S. Hrg. 98-103

COAL DISTRIBUTION AND UTILIZATION ACT OF 1983

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 267

A BILL ENTITLED THE "COAL DISTRIBUTION AND UTILIZATION ACT OF 1983"

MARCH 14, 1983

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COAL DISTRIBUTION AND UTILIZATION ACT OF 1983

MONDAY, MARCH 14, 1983

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-366, Dirksen Office Building, Hon. James A. McClure, chairman, presiding.

Present: Senators McClure, Wallop, Warner, Hecht, Johnston, Ford, and Melcher.

Also present: Gary Ellsworth, deputy chief counsel for natural resources; D. Michael Harvey, chief council for the minority; Elizabeth Moler counsel for the minority; Linda Mason, professional staff member for the minority; and Craig Gannett, council for the minority.

Senator **WARNER** [presiding]. Chairman McClure is at the moment in a classified meeting, so I will open the hearing this morning.

As a courtesy to fellow colleagues and to our colleague from Missouri, Senator Danforth, if you would like to lead off, and we will have the opening statements.

[The text of S. 267 follows:]

II

98TH CONGRESS
1ST SESSION

S. 267

Entitled the "Coal Distribution and Utilization Act of 1983".

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 25), 1983

Mr. JOHNSON (for himself, Mr. BUMPERS, Mr. MURKOWSKI, Mr. BRADLEY, Mr. STEVENS, Mrs. HAWKINS, Mr. HUMPHREY, Mr. NICKLES, Mr. GOLDWATER, Mr. MATSUNAGA, Mr. WILSON, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

Entitled the "Coal Distribution and Utilization Act of 1983".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the continuing dependence of the United States on foreign sources for petroleum and petroleum products entails grave national security risks, results in major balance-of-payment deficits, and increases in inflation and unemployment in the domestic economy;

(2) the United States possesses extensive coal reserves that must be produced, distributed, and utilized to reduce the Nation's dependence on imported petroleum;

(3) domestic coal reserves cannot be developed and used for fuel unless adequate transportation systems and facilities exist for the efficient and economic distribution of large quantities of coal to markets in interstate and foreign commerce at competitive prices across great distances;

(4) the Nation's coal distribution system must include interstate coal pipeline distribution systems that will assist the Nation to develop efficiently and use its coal resources;

(5) the construction of interstate coal pipeline distribution systems to distribute domestic coal will be facilitated by granting the power of eminent domain to certain interstate coal pipeline distribution systems;

(6) the construction of interstate coal pipeline distribution systems is a beneficial public use that justifies granting the Federal power of eminent domain to those systems for which a finding of national interest has been made pursuant to this Act;

(7) State water law and interstate compacts are carefully balanced and structured systems for the allocation of water;

(8) the national interest is best served by developing interstate coal pipeline distribution systems only in the context of those State water laws and interstate compacts, notwithstanding the potential burden on interstate commerce; and

(9) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law and interstate compacts on the allocation of water.

(b) The purpose of this Act is to facilitate the development of interstate coal pipeline distribution systems by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined to be in the national interest: *Provided,* That such development is consistent with State water law and interstate compacts, as provided herein.

DEFINITIONS

SEC. 3. For the purposes of this Act the term—

(1) "coal" means any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite;

(2) "interstate coal pipeline distribution system" means any pipeline system the primary economic purpose of which is the distribution of coal in a liquid or solid state, but in no event may the primary purpose be the distribution of water, whether alone or mixed with other substances—

(A) from one or more points outside a State to one or more points within a State or between two or more points within a State through another State, or

(B) from one or more points within Alaska to one or more points in a foreign country. Such a pipeline system shall be deemed to be in interstate or foreign commerce if coal that enters the pipeline system is delivered for commercial use in a State other than Alaska in which the coal was placed in the pipeline, in a territory of the United States, or in a foreign country.

An interstate coal pipeline distribution system includes line pipe, valves, pumping stations, water supply pipelines, and such dewatering facilities as are necessary to delivery operations. Such systems shall not include rail, port, highway, or other ancillary coal-gathering or coal-storage facilities. Access to water for the operation and maintenance of the pipeline shall be governed by State laws and procedures except where application of such State laws and procedures would have the effect of prohibiting such access;

(3) "private lands" means any interest in any land other than interests—

(A) owned by the United States or agency thereof or owned by any State or any political subdivision thereof;

(B) held in trust by the United States for an Indian or Indian tribe or owned by an Indian or Indian tribe subject to a restraint against alienation imposed by the United States; or

(C) owned by a regional or village corporation established under the Alaska Native Claims Settlement Act, as amended, if such land was transferred to such corporation pursuant to said Act;

(4) "right-of-way" means such interest in land as may be necessary for construction, operation, and maintenance of an interstate coal pipeline distribution system;

(5) "Secretary" means the Secretary of Energy or his successor; and

(6) "State" means a State of the United States and the District of Columbia.

EMINENT DOMAIN AUTHORITY

SEC. 4. (a) AUTHORITY TO MAKE NATIONAL INTEREST DETERMINATION.—(1) Upon application of any person proposing to construct an interstate coal pipeline distribution system, who has filed and secured approval of a water permit or acquired other appropriate authorization for reservation, appropriation, use, or diversion of water under applicable State law as provided in section 5, the Secretary shall determine whether the construction of such system shall be in the national interest.

(2) The determination of the Secretary under paragraph (1) as to whether a proposed interstate coal pipeline distribution system is in the national interest shall be based on the record as a whole, taking into consideration each of the criteria set forth in subsection (b).

(b) FINDINGS.—In making a determination under subsection (a) with respect to any proposed interstate coal pipeline distribution system, the Secretary shall make findings concerning the extent to which the system—

(1) would help meet national needs for coal distribution and utilization considering, among other matters, alternate routes, or means of distributing coal;

(2) would enhance competition and provide new market outlets and opportunities for coal producers, including small and independent producers;

(3) would contribute to the national security by encouraging the displacement of imported petroleum, petroleum products, and coal with domestic coal;

(4) would result in economic benefits including—

(A) reduction in coal transportation costs;

(B) reduction in wholesale and retail electric rates; and

(C) enhance reliability of supplies of both coal and electric energy; and

(5) would affect the environment, compared to the environmental impacts of alternatives, including—

(A) railroad transportation;

(B) alternate pipeline routes; and

(C) coal utilization facilities, including electric generating plants at coal mine sites and coal gasification plants.

(c) STATE CONSULTATION.—Prior to making the findings in subsection (b) regarding a proposed interstate coal pipeline distribution system, the Secretary shall provide an opportunity for written comment from any State in which a proposed interstate coal pipeline distribution system would be located or which would otherwise be affected by a proposed interstate coal pipeline distribution system.

(d) ANTITRUST REVIEW.—(1) Not later than ten days after any application for a determination under this section is filed with the Secretary, the Secretary shall notify the Attorney General of the filing of such application and shall provide the Attorney General with a copy of such application and such other information as the Attorney General may request. The Attorney General shall conduct an antitrust review to determine the likely effects upon competition of approval of such application and, not later than one hundred and twenty days after the date of receipt of such notification shall advise the Secretary of the results of such review, including, but not limited to, findings, and recommendations concerning such terms and conditions as the Attorney General deems necessary to protect and promote competition. No application may be determined to be in the national interest under this section if the Attorney General advises the Secretary in writing that, on the basis of such review, approval of such application is not consistent with the antitrust laws.

(2) For the purpose of paragraph (1), the term—

(A) "antitrust laws" has the meaning such term has under the first section of the Clayton Act (15 U.S.C. 12); and

(B) "antitrust review" has the meaning the term "antitrust investigation" has under section 2 of the Antitrust Civil Process Act (15 U.S.C. 1311).

(e) EMINENT DOMAIN AUTHORITY.—(1) Any person proposing to build an interstate coal pipeline distribution system, the construction of which has been determined by the Secretary to be in the national interest, may acquire rights-of-way over, under, upon, or through private lands by exercise of the power of eminent domain in the United States district court for the district in which such lands are located or in the appropriate court of the State in which such lands are located. In any action or proceeding to acquire rights-of-way under this section, such action or proceeding shall conform to the laws, practices, and procedures relating to the general eminent domain law of the State where the property is situated, except that in the case of any such State law, practice, or procedure, the effect of which would prohibit any acquisition under this section, such State law, practice, or procedure shall not be applicable.

(2) Nothing in this section shall be construed to permit any person to acquire any right to take, use, dispose of, or develop water through exercise of the power of eminent domain granted under this Act.

(3) No project constructed pursuant to the authorities of this section shall be considered to be a Federal project for purposes of the application for or assignment of water rights.

(4) No right-of-way may be acquired through exercise of the power of eminent domain under this section if such right-of-way is over, under, upon, or through—

(A) any land which is part of an historic site of National, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof; or

(B) any land designated as wilderness or wildlife refuge in accordance with applicable law by the duly constituted authority; unless there is no feasible and prudent alternative to the acquisition of such right-of-way and reasonable planning is made to minimize harm to such site resulting from the acquisition.

(f) ALTERNATIVE ROUTES.—(1) Nothing in this section shall be deemed to prohibit the applicant from amending his application to request a right-of-way over any alternate route.

(2) The Secretary may require the relocation of any right-of-way sought pursuant to this Act upon a showing that—

(A) such relocation is necessary to enable the United States to fully realize the value of its mineral interest;

(B) such alternate route is available; and

(C) such relocation would not result in unreasonable expense.

(g) PAYMENT FOR FEDERAL COAL.—(1) Each application filed pursuant to subsection (a) shall list each instance where the proposed right-of-way crosses lands wherein the United States maintains a mineral interest regarding coal (hereinafter referred to as "Federal coal"). Not later than ten days after any application for a determination under this section is filed with the Secretary, the Secretary shall notify the Secretary of the Interior of the filing of such application and shall provide the Secretary of the Interior with a copy of such application and such other information as the Secretary of the Interior may request.

(2)(A) The Secretary of the Interior shall evaluate the effects of approval of such application upon the ability of the United States to realize the value of such mineral interest as a result of approval of the application.

(B) The Secretary of the Interior shall determine—

(i) terms and conditions necessary to minimize the impact of such right-of-way on the establishment of logical mining units; and

(ii) the extent to which alternate routes are available which would minimize the impact of granting the right-of-way on the ability of the Federal Government to realize the value of Federal coal.

(C) The Secretary of the Interior shall establish the fair market value of the Federal coal precluded from being recovered as a result of the proposed right-of-way. The Secretary of the Interior shall also establish the amount of reduction of the fair market value of Federal coal which will be more costly to recover as a result of the proposed right-of-way.

(3) The Secretary of Energy shall thereafter establish such terms and conditions requiring the applicant to pay the United States the amount established by the Secretary of the Interior pursuant to subparagraph (C).

(h) RULES AND REGULATIONS.—The Secretary shall promulgate such rules and regulatons as are necessary for the expeditious exercise of the authority granted in this section.

(i) ADDITIONAL REQUIREMENT.—In implementing this section, the Secretary shall be subject to the provisions of section 210 of Public Law 90-537, as amended (43 U.S.C. 1511).

PRIMACY OF STATE WATER LAW

SEC. 5. (a) The United States or its agents, permittees, licensees, or transferees or any interstate coal pipeline distribution system shall not reserve, appropriate, purchase, transfer, use, divert, dedicate, or claim water within any State for an interstate coal pipeline distribution system, unless such reservation, appropriation, purchase, transfer, use, diversion, dedication, or claim takes place pursuant to and in compliance with substantive and procedural law of that State relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights.

(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions, on permits or authorizations for the reservation, appropriation, use, or diversion of water for any interstate coal pipeline distribution system shall be determined pursuant to the law of the State granting such permit or authorization.

(c) Nothing in this Act shall—

(1) affect in any way the validity of or preempt any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, purchase, transfer, use, or diversion of water;

(2) preempt or modify any State or Federal law or interstate compact dealing with water quality or disposal;

(3) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any ground water resources; or

(4) affect water rights of any Indian or Indian tribe which were established by the setting aside of a reservation by treaty, executive order, agreement or Act of the Congress.

(d) No waters to which the Federal right can be asserted shall be used in any interstate coal pipeline distribution system, unless authorized pursuant to and subject to State law, the same as other water rights acquired under subsection (a).

COAL PIPELINE CONSTRUCTION AND MAINTENANCE

SEC. 6. (a) Except as provided in subsection (b), all articles, materials, and supplies used in the construction and maintenance of an interstate coal pipeline distribution system which has been determined to be in the national interest under section 4 shall have been manufactured in the United States substantially from all articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States.

(b) The Secretary may, upon application of a person proposing to construct a coal pipeline distribution system, determined to be in the national interest under section 4, exempt such person from the requirements of subsection (a) with respect to the purchase of particular articles, materials, or supplies, if the Secretary determines that—

(1) the cost of imposing such requirements with respect to such articles, materials, or supplies is unreasonable; or

(2) such articles, materials, or supplies or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured as the case may be in the United States in sufficient and

reasonably available commercial quantities and of a satisfactory quality.

(c) The provisions of this subsection shall not apply—

(1) in any case in which the cost of the articles, materials, or supplies purchased is less than $100,000; or

(2) in the case of articles, materials, or supplies purchased pursuant to a contract entered into before the date of enactment of this Act.

(d) For purposes of this section, the term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

APPLICATION OF STATE AND LOCAL LAW

SEC. 7. Nothing in this Act shall alter or in any way preempt the applicability of any State or local law, regulation, or rule of law pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such applicability would have the effect of prohibiting the location, construction, operation, or maintenance of the interstate coal pipeline distribution system.

CONTINUING JURISDICTION OF STATE PUBLIC UTILITY COMMISSIONS

SEC. 8. Nothing in this Act shall be construed to require any forms of automatic pass through of, or preempt the ratemaking authority of any State utility regulatory agency or the Federal Energy Regulatory Commission with respect to costs related to construction, operation, and maintenance of any interstate coal pipeline distribution system, whether or not such costs have been provided for by contract between a utility and the interstate coal pipeline distribution system operator.

LIMITATION ON FURTHER REGULATION

SEC. 9. Nothing in this Act shall be construed to authorize the further regulation of, or to relate to or otherwise affect the regulation of, interstate common carriers.

STATEMENT OF HON. JOHN C. DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator **Danforth**. Mr. Chairman, thank you very much. Mr. Chairman, I come here today to express my strong opposition to S. 267, legislation conferring the power of Federal eminent domain on coal slurry pipelines.

I believe that this bill, while intended to promote competition and thus lower prices for the transportation of coal, in fact, will not aid competition and will not aid consumers. It will hurt farmers, hurt railroads, and trample over State powers to control their own land and water.

Mr. Chairman, as chairman of the Subcommittee on Surface Transportation, I held hearings last fall on the impacts of coal slurry pipelines, impacts on other modes of transportation, on agriculture and the environment. I came away from those hearings more convinced than ever that coal slurry pipelines are a wrongheaded idea in all but the most unusual of circumstances.

I strongly oppose a special grant of Federal authority to assist them. To start with, Mr. Chairman, I do not agree with the finding in S. 267 that the Nation's coal distribution system must include interstate coal pipeline distribution systems.

On the contrary, I believe that we already have in place an efficient system for hauling coal, one that currently has an enormous amount of excess capacity and one that would be severely damaged by the creation of a redundant transportation system dedicated to hauling the single most profitable commodity available to the railroads.

Some slurry advocates say that pipelines will take such a small portion of the Nation's coal traffic that the railroads will scarcely notice the difference, but the Office of Technology Assessment estimated that by the year 2000 pipelines would cause a loss of $688 million in net railway operating revenues in 1971 dollars. That exceeds the net operating revenues of the entire railroad industry in any year since 1971.

In an effort to recoup some of those losses, railroads would have to raise their rates on the other bulk commodities that they transport, chiefly grain and the coal that will remain to them.

At our hearings last year, Robert Blanchette, head of the Federal Railroad Administration, testified about this problem. When Senator Pressler asked how high grain rates in South Dakota would go if pipelines diverted coal traffic from railroads, Blanchette replied, "I think the rates will be higher than a cat's back." Supplemented more fully, if less colorfully, for the record, his answer was that grain rates there would have to increase about 40 percent to maintain the railroads' current return on investment. At a time of record-breaking foreclosure rates on our Nation's farms, I hardly think we should be considering ways to make matters worse.

I am also concerned about the way these pipelines will be financed. In order to attract the capital needed for construction, a pipeline will have to demonstrate a market for its product. It will do so by lining up long-term take-or-pay contracts for the coal, and take-or-pay contracts, as this committee knows, are not an unmitigated blessing. When market conditions change, they can become a heavy burden.

Railroad competition, spurred by the development of unit trains, put the Nation's first coal pipeline in Ohio out of business. If that pipeline had been financed by take-or-pay contracts, its customers still would be paying excessive freight rates for coal.

Coal slurry pipelines may spur some price competition when they are still in their planning phase, but as soon as the ink dries on their take-or-pay contracts competition will be foreclosed by 25 or 30 years and because pipelines will need guaranteed supply as well as demand, they will mainly serve the biggest, most efficient coal operations. Smaller operators will be put at a competitive disadvantage if their bigger neighbors enjoy cheaper transportation costs, especially if railroads raise their rates and cut back service to mining operations that do not have access to a pipeline.

Other questions also remain unanswered. If utilities enter into take-or-pay contracts with prospective pipelines, what protection will consumers have against construction cost overruns? What protection will they have against utilities becoming vertically integrated from the mine mouth to the meter? Where are the traditional regulatory requirements for pipeline construction and operation such as those contained in the Mineral Land Leasing Act?

There are serious environmental concerns as well. I do not believe that the danger of slurry spills has been adequately considered, nor has the difficulty of disposing of the enormous amounts of contaminated waste water that would be produced, and it is particularly hard to believe that this committee would countenance construction of coal slurry pipelines through wilderness areas and wildlife refuges under any circumstance, but S. 267 permits just that.

Additionally, coal slurry pipelines are demonstrably less energy efficient than railroads, using 42 percent more energy per ton-mile than do unit trains.

The most critical environmental concern, though, is the pipelines' extravagant use of an increasingly precious resource—water. Coal slurry pipelines require a ton of water for every ton of coal they transport. Where is all that water going to come from? From competing uses—from irrigation for agriculture, from navigation, from municipal and industrial water supply, from hydroelectric generation. Mr. Chairman, we simply don't have all that water to spare.

S. 267 attempts to preserve the States' control over their water even as it is taking away the States' control over their land. I do not believe that it succeeds in reconciling these fundamentally divergent purposes, particularly in view of the Supreme Court's declaration in *Sporhase* v. *Nebraska* that water is an article of commerce.

The Court has held that Congress must expressly state its intent and policy to sustain State law from attack under the commerce clause of the Constitution, but S. 267 fails in that regard. Nowhere does it state Congress intent and policy to allow State law to prevent construction or operation of coal slurry pipelines. Indeed, the legislative language is quite to the contrary. Section 7, for example, protexts State or local law, "* * * pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such applicability would have the effect of prohibiting the location, construction, operation, or maintenance of the interstate coal pipeline distribution system."

Sections 3(2) governing access to water and 4(e) relating to State eminent domain laws contain similar language. The clear message is that State law will prevail only as long as it does not prevent construction or operation of a pipeline.

Let us suppose that this bill is passed and a State willingly allocates some of its water supplies to a coal slurry pipeline. Then a drought strikes and that water is needed for irrigation, for industrial, commercial, and residential use. The State legislature attempts to act. It attempts to revoke the pipeline's water permit, and then the pipeline goes to court. Who prevails? The answer to that question is clear. The pipeline prevails. Under this legislation the State legislature is powerless to act.

When this committee began its consideration of S. 1844 a year ago, Senator Wallop stated, and I quote:

> Not until there is a provision which clearly provides that a state has the unfettered right to literally kill a coal slurry pipeline by withholding or terminating water rights granted under state law will there be a coal slurry eminent domain law.

That is the standard that S. 267 fails to meet. S. 267 also is utterly silent on the question of shared water sources, whether they be surface water or ground water. The ETSI project offers a useful case in point. Originally, ETSI proposed to draw water from the underground Madison formation in Wyoming. Despite the fact that this formation serves neighboring States of South Dakota and Nebraska, neither State was consulted about the possibility that a large amount of water was to be taken from Wyoming, with possibly serious consequences for agriculture in their States. S. 267 does nothing to change those circumstances.

In fact, ETSI changed its mind about its water source and reached agreement with South Dakota to draw water from the Missouri River for its pipeline. Now all the States downstream from South Dakota, including Missouri, were potentially affected, but again none was consulted about the water sale.

S. 267 does nothing to change those circumstances either. Mr. Chairman, the arguments advanced in favor of this legislation have changed repeatedly over the years, and all of them have been found wanting. Ten years ago this legislation was said to be needed because of a predicted boom in coal, but that boom has not materialized on schedule. The railroads are amply equipped to handle any additional traffic that may be reasonably foreseen.

Two years ago this legislation was said to be needed because of the rampaging rate of inflation. Coal slurry pipelines, being capital intensive, have lower labor costs than railroads over time, but now inflation is abating and those benefits are less compelling.

Now this legislation is said to be needed because of the high rate of unemployment. Coal slurry proponents claim that a vast number of jobs will be created by pipelines. This turns their previous argument precisely on its head and also ignores the OTA's conclusion that total cumulative employment by slurry pipelines and railroads until the year 2000 would be roughly equivalent with or without slurry pipeline development.

In addition, slurry construction jobs would be temporary. Lost railroad jobs would be permanent.

Mr. Chairman, none of the arguments in favor of this legislation stands up to scrutiny. There is no need for it and no benefits to be gained from it. Indeed, S. 267 is contrary to the national interest.

I strongly urge the committee to reject it.

[The prepared statement of Senator Danforth follows:]

PREPARED STATEMENT OF HON. JOHN C. DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Mr. Chairman, I come here today to express my strong opposition to S. 267, legislation conferring the power of federal eminent domain on coal slurry pipelines. I believe that this bill, while intended to promote competition and thus lower prices for the transportation of coal, in fact will not aid competition and will not aid consumers. It will hurt farmers, hurt railroads, and trample over state powers to control their own land and water.

As Chairman of the Subcommittee on Surface Transportation, I held hearings last fall on the impacts of coal slurry pipelines--impacts on other modes of transportation, on agriculture and the environment. I came away from those hearings more convinced than ever that coal slurry pipelines are a wrongheaded idea in all but the most unusual of circumstances. I strongly oppose a special grant of federal authority to assist them.

To start with, Mr. Chairman, I do not agree with the "finding" in S. 267 that "the Nation's coal distribution system must include interstate coal pipeline distribution systems." On the contrary, I believe that we already have in place an efficient system for hauling coal--one that currently has an enormous amount of excess capacity, and one that would be severely damaged by the creation of a redundant transportation system dedicated to hauling the single most profitable commodity available to the railroads.

Some slurry advocates say that pipelines will take such a small portion of the nation's coal traffic that the railroads will scarcely notice the difference. But the Office of Technology Assessment estimated that by the year 2000 pipelines would cause a loss of $688 million in net railway operating revenues, in 1971 dollars. That exceeds the net operating revenues of the entire railroad industry in any year since 1971.

Mr. Chairman, I suspect that there would be very little support on this Committee for abolishing the private express statutes that give the U. S. Postal Service a monopoly on first-class mail. But the analogy to this bill is inescapable. Skimming off first-class business mail in densely populated urban areas might provide some economies to the users of that mail, but the Postal Service would find itself unable to provide service to the remainder of its customers--particularly those in thinly populated rural areas--at the same rates. Railroads are common carriers, essential to our Nation's transportation system. Deprived of a major segment of their coal traffic, they would be forced to respond by raising their rates on other bulk commodities--the coal that remains to them, and grain, chiefly--to the detriment of those shippers and ultimately to consumers.

At our hearings last year, Robert Blanchette, head of the Federal Railroad Administration, testified about this problem. Asked by Senator Pressler how high grain rates in South Dakota would go if pipelines diverted coal traffic from railroads, Blanchette replied, "I think the rates will be higher than a cat's back." Supplemented more fully--if less colorfully--for the record, his answer was that grain rates there would have to increase by 40 percent to maintain the railroads' current return on investment. At a time of record-breaking foreclosure rates on our Nation's farms, I hardly think we should be considering ways to make matters worse.

I am also concerned about the way these pipelines will be financed. In order to attract the capital needed for construction, a pipeline will have to demonstrate a market for its product. It will do so by lining up long-term take-or-pay contracts for the coal. And take-or-pay contracts, as this Committee knows, are not an unmitigated blessing. When market conditions change, they can become a heavy burden. Railroad competition, spurred by the development of unit trains, put the nation's first coal pipeline, in Ohio, out of business. If that pipeline had been financed by take-or-pay contracts, its customers still would be paying excessive freight rates for coal.

Coal slurry pipelines may spur some price competition when they are still in their planning phase, but as soon as the ink dries on their take-or-pay contracts, competition will be foreclosed for 25 or 30 years. And because pipelines will need guaranteed supply as well as demand, they will mainly benefit the biggest, most efficient coal operations. Smaller operators will be put at a competitive disadvantage if their bigger neighbors enjoy cheaper transportation costs--especially if railroads raise their rates and cut back service to those mining operations that do not have access to a pipeline.

Other questions also remain unanswered. If utilities enter into take-or-pay contracts with prospective pipelines, what protection will consumers have against construction cost overruns? What protection will they have against utilities becoming vertically integrated from the mine mouth to the meter? Where are the traditional regulatory requirements for pipeline construction and operation, such as those contained in the Mineral Lands Leasing Act?

There are serious environmental concerns as well. I do not believe that the danger of slurry spills has been adequately considered, nor has the difficulty of disposing of the enormous amounts of contaminated wastewater that would be produced. A report issued by Teknekron, Inc., in October 1982 states that "recent research on the effects of coal on water in an anaerobic environment (an environment lacking oxygen, as in a pipeline) reveals several potential water-quality problems." The report goes on to explain:

> There is an increase in the acidity of the water, which may cause toxic metals, such as mercury and beryllium, to be leached from the coal.
>
> Compared with the feedwater, the wastewater will contain higher concentrations of suspended solids, total dissolved solids, and sulfates. Furthermore, the use of phosphorus compounds to control pipeline corrosion will increase phosphates in the wastewater, leading to biofouling of cooling-tower components if the water is used for power-plant cooling.
>
> In the treatment of wastewater with chlorine for reuse, dissolved organic compounds released by the coal may react to form carcinogenic chlorinated hydrocarbons. Thorough study must be made of this potential problem if the slurry wastewater is to be recycled for human consumption.

Even the simple placement of pipelines underground is not as benign as one might assume. Two weeks ago, Congressman Cooper Evans testified about the considerable disruption that pipelines cause to agricultural drainage systems. And it is particularly hard to believe that this Committee would countenance construction of coal slurry pipelines through wilderness areas and wildlife refuges under any circumstances, but S. 267 permits just that.

Additionally, coal slurry pipelines are demonstrably less energy-efficient than railroads, using 42 percent more energy per ton-mile than do unit trains.

The most critical environmental concern, though, is the pipelines' extravagant use of an increasingly precious resource--water. Coal slurry pipelines require a ton of water for every ton of coal they transport. Where is all that water going to come from? From competing uses: From irrigation for agriculture. From navigation. From municipal and industrial water supply. From hydroelectric generation. Mr. Chairman, we simply don't have all that water to spare.

Let us return for a moment to basics. What is the problem that S. 267 attempts to solve, and how does it propose to solve it?

The problem, we are told, is that the railroads are preventing the construction of coal slurry pipelines by refusing them permission to cross railroad property.

I would first suggest that that is a myth. It is true that railroads oppose coal slurry pipelines, as they all other competitors. But it is also true that west of the Mississippi, the railroads generally do not own their land in fee and thus cannot prevent such pipelines from crossing their rights of way. Energy Transportation Systems, Inc. (ETSI), had to go to court to prove that point, but it succeeded in doing so. West of the Mississippi, the railroads cannot impede physically the construction of these pipelines.

East of the Mississippi, the problem is different. Railroads there generally do own their land in fee and can prevent pipelines from crossing. But using this legislation to solve that problem is like killing a flea with a howitzer. The remedy is too broad and creates its own difficulties.

The power of eminent domain was called "compulsory surrender" in Scotland. It overrides the basic right of citizens to enjoy and dispose of their private property as they see fit. Such power should be granted only in those rare circumstances when the public benefit flowing from its exercise clearly outweighs the harm to individuals resulting from the use of their property in derogation of their wishes.

It is a fundamental principle of American law that private property cannot be taken by the government except for a public purpose. The courts have, without exception, held that it is beyond the legislative power to take, against one's will, the property of one and give it to another for what the courts deem a private purpose. Arguably, S. 267 does just that. Coal slurry pipelines are a special-interest, single-purpose transportation mode. The public purpose served by their construction is difficult to discern, particularly in view of the broad federal powers conferred by this bill.

The power of federal eminent domain was granted to natural gas pipelines, but there is no practical alternative to pipeline carriage of gas, as there is with coal. Interstate oil pipelines, ammonia fertilizer pipelines, and railroads were built for the most part with only state eminent domain authority.

Some 20 states have statutes that would permit eminent domain for coal slurry pipelines; five others have statutes that may permit eminent domain.

Recently, of course, the Commonwealth of Virginia considered granting state eminent domain to coal slurry pipelines, in the context of a pipeline proposed by the Virginia Electric Power Company (Vepco). That proposal was defeated in the House of Delegates on February 2. Yet Vepco had the brass to come up to the Congress one month later and ask for Uncle Sam to overturn that vote.

Mr. Chairman, I am a creature of state government. I served for eight years as Attorney General of the State of Missouri. I do not happen to believe that wisdom is the exclusive property of the federal government. I do believe that the states should have wide latitude to control the use of their land and water.

When President Reagan addressed this issue, he expressed a similar point of view:

> Our commitment to the vitality of state governments should not be abandoned simply because it may at times be inconvenient. The extension of federal powers of eminent domain should not be taken lightly.

And Secretary Watt stated in his testimony on this issue:

> I find it ironic that we are making every effort to protect state authority over water while seriously considering diminishing state authority over the disposition of nonfederal lands within their boundaries. Is state authority over land any less worthy of our concern and protection than state authority over water?
>
> I do not share the pessimism of those who believe that the states will not act responsibly in helping to attain national energy goals . . . . I believe that the government is best which remains closest to the people. We should fight vigorously to ensure that we reverse the flow of power of the last several decades and demand recognition of the distinction between the powers granted to the federal government and those reserved to the states or to the people.

Let us be clear about the power of eminent domain. Once granted, it will not be applied solely to the railroads, who have teams of attorneys ready to negotiate and litigate. It will also apply to farmers and ranchers who have little such expertise. Abuses of such powers in the past have led to widespread ill will about granting condemnation authority for any purpose.

In my own state, when the Corps of Engineers assembled flood easements for the Truman Dam project, it used its powers of eminent domain. A gentleman from Appleton City, Missouri, Mr. Eldo Sutton, recently wrote me about that experience, and I would like to share excerpts of that letter with the Committee. He wrote:

> I was the first landowner that was contacted by the negotiator from the Corps of Engineers concerning easements in this area. The negotiator introduced his self as George Williams. I thought that I would treat him respectful and invited him to go to the house where it was comfortable. He began by reading a contract concerning easements, then begin showing me maps . . . . Mr. Williams' easement offer was $7,600.00 for 40.1 acres or $190.00 per acre. I told him that wasn't even the price that a good crop of beans would bring . . . .
>
> Mr. Williams came back in a few days and said they had my easements all figured out and handed me a new map with all my land deleted except 16.51 acres . . . . His price for the 16.51 acres was $2,075. That was less than $127.00 per acre. I said no, that is not even the price of one crop of beans . . . . We argued back and forth, then he threatened me. He said, we will take you to court and condem it if you won't take the $2,075.00 for the easement . . . .
>
> He finally came up to $3,000.00 which would be $181.71 per acre. I said no, that is still not the price of a crop of beans. Then he threatened me again. He reached into his briefcase and pulled out a paper and began writing and said, "I'll just fill out a form and take you to court and condem it if you won't take $3,000.00. That was when he bluffed me and I signed the paper, then he left.

Later the Corps paid a neighbor of Mr. Sutton $609 an acre for flood easements, and he concluded, "They bluffed me. They skinned me. They beat me out of easements." One can hardly presume that a private coal slurry concern would be any less interested in cutting its costs than the federal government. We could expect many such tales to arise from this legislation.

The questions of eminent domain and state water law are inextricably intertwined. Along with other language in the bill, the granting of eminent domain authority confers upon coal slurry pipelines a declaration that they are in the national interest--a declaration that will be posed against state laws that get in the pipelines' way.

S. 267 attempts to preserve the states' control over their water even as it takes away the states' control over their land. I do not believe that it succeeds in reconciling these fundamentally divergent purposes, particularly in view of the Supreme Court's declaration in Sporhase v. Nebraska that water is an article of commerce.

If S. 267 became law, and a state tried to prohibit or terminate the use of water for coal slurry pipelines, I believe that such action could be challenged under the interstate commerce clause of the Constitution and would not be allowed to stand.

Parenthetically, I should note that report language must not be found acceptable by those who seek a strong affirmation of state water law. If the Supreme Court's rulings in this area have made anything clear, it is that Congress's intent and policy to sustain state legislation from attack under the commerce clause must be expressly stated. Report language does not meet that test, especially in a situation where the legislative language itself may be substantially altered on the floor of the Senate or in conference with the House.

Assistant Attorney General Carol Dinkins testified last year before the Subcommittee on Water Resources on the attempt to fortify S. 1844 with language in the Committee report: "Of course, whether the courts will ultimately determine that this expressed intent is sufficiently clear to immunize those (state) laws from commerce clause scrutiny is necessarily a matter of speculation, the resolution of which must await judicial analysis. We do note, however, that the operative language of the bill contained in Section 5 of the bill is not, standing alone, free from ambiguity . . . . There are risks inherent in this proposal, especially in its reliance on judicial acceptance of certain aspects of the accompanying legislative history."

The risks, of course, are that when state law comes into irreconcilable conflict with a coal slurry pipeline, the state law may fall because the Congress did not expressly state its intent and policy to allow state law to prevent construction or operation of coal slurry pipelines. Indeed, the legislative language is quite to the contrary. Section 7, for example, protects state or local law "pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such applicability would have the effect of prohibiting the location, construction, operation, or maintenance of the interstate coal pipeline distribution system."

Professor Charles Corker, a specialist in water law at the University of Washington, neatly dissected this section in a letter to Senator Baucus. He asked:

> If a state may not prohibit the location, operation, or maintenance of the coal pipeline system, what can a state do? I would suppose that a state could still direct that the pipeline be painted red, white, and blue, that it be stencilled with the state's motto in Latin or English, or the state can provide for erection of tasteful screens to hide the pipeline from public view. And on Flag Day the Governor might stand on the pipe to address his people on the federally recognized virtue of "primacy of state law." But it is clear that "primacy" does not extend to deciding the pipeline's location, or interfering with its operation and maintenance.
>
> Section 7 could be amended to give the State a power to refuse to permit within its boundaries the diversion of water to slurry coal, the use within its boundaries of water to slurry coal, or the delivery within its borders of slurried coal or water.

But the bill does not do so.

An equally telling example comes from the "Definitions" section of the bill. Section 3(2) states that "Access to water for the operation and maintenance of the pipeline shall be governed by State laws and procedures except where application of such State laws and procedures would have the effect of prohibiting such access." Again, the clear message is that State law will prevail only as long as it does not prevent construction or operation of a pipeline.

Another example comes from section 4(e) of S. 267. Eminent domain proceedings under that section must conform to state law "except that in the case of any such State law, practice, or procedure, the effect of which would prohibit any acquisition under this section, such State law, practice, or procedure shall not be applicable." Again, state law extends only to the point where it does not block the pipeline altogether.

Let us suppose that this bill is passed, and a state willingly allocates some of its water supplies to a coal slurry pipeline. Then a drought strikes, and that water is needed for irrigation, for industrial, commercial, and residential use. The state legislature revokes the pipeline's water permit, and the pipeline goes to court. Who prevails? The answer is clear. The pipeline prevails. Under this legislation, the state legislature is powerless to act.

Yet another example of this disregard for state law occurs in the "Findings" section. There the bill states that "the construction of interstate coal pipeline distribution systems is a beneficial public use." Yet Montana state law specifically declares the use of water for coal slurry pipelines not to be a beneficial use--thereby making it ineligible for such an appropriation. Clearly, that law would fall.

Finally, there is Section 5 itself, "Primacy of State Water Law." What can one make of the peculiarly redundant and meaningless phrase in subsection (b): "Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions, on permits or authorizations for the reservation, appropriation, use, or diversion of water for any interstate coal pipeline distribution system shall be determined pursuant to the law of the State granting such permit or authorization."

One could write that phrase off to sloppy draftsmanship, or a typographical error, perhaps, except for two points--first, it comes verbatim from S. 1844, as reported last year, and second, in earlier drafts it read as follows: "including terms or conditions terminating use, ..." Evidently, an explicit decision was made to avoid giving such powers to the States.

When this Committee began its consideration of S. 1844 a year ago, Senator Wallop stated: "Not until there is a provision which clearly provides that a state has the unfettered right to literally kill a coal slurry pipeline by withholding or terminating water rights granted under state law, will there be a coal slurry eminent domain law." That is the standard that S. 267 fails to meet.

It is a basic principle of statutory construction that if a court is faced with contradictory statutory provisions--as here, the potentially conflicting purposes of facilitating coal slurry pipelines and preserving state water law--the court will construe the provisions in the way that best serves the fundamental purpose of the legislation: in this case, construction of pipelines.

More than four years ago, Wyoming Governor Ed Herschler made this very point in a letter to Mr. Frank Odasz, vice president of ETSI. Governor Herschler reviewed a number of cases in which state water laws had been overridden and wrote: "I can only conclude that when a Federal court decides that a federally sanctioned program is in the national interest and should be carried out even in the face of State laws to the contrary, it will not matter what kind of language is contained in the congressional authorization with respect to States rights . . . . I do not think there is any wording in the world which would stem the tide of this long line of adverse court decisions."

S. 267 also is utterly silent on the question of shared water sources, whether they be surface water or groundwater. The ETSI project offers a useful case in point.

Originally, ETSI proposed to draw water from the underground Madison formation in Wyoming. Despite the fact that this formation serves neighboring areas of South Dakota and Nebraska, neither state was consulted about the possibility that a large amount of water was to be taken from Wyoming, with possibly serious consequences for agriculture in their states. S. 267 does nothing to change those circumstances.

In fact, ETSI changed its mind about its water source and reached agreement with South Dakota to draw water from the Missouri River for its pipeline. Now all the states downstream of South Dakota--including Missouri--were potentially affected, but again none was consulted about the water sale. S. 267 does nothing to change those circumstances, either.

This approach to the question of state water rights would legitimize through legislation a state Harmon Doctrine, encouraging a state to do whatever it pleases with the rivers and streams within its borders, without regard to other states that rely on those waters. The Harmon Doctrine has been firmly rejected by the Supreme Court for settlement of interstate disputes over water, in favor of settlement "upon the basis of equality of rights," or equitable apportionment. As Professor Corker noted in his letter to Senator Baucus, "No state should be permitted power to dispose of more than its own equitable share of the interstate water resource." Such power, he added, "is not the law since Kansas v. Colorado and should not be the law in a federal union."

The ETSI project has raised to the forefront these concerns about shared water sources, just as the Sporhase case has elevated concerns about state control of its own water. In providing for the development of a transportation system that would require large quantities of water, this Committee should not address one of these concerns without acknowledging the other.

To reiterate, the problems that arise from this bill with regard to state water rights are inextricably linked to the granting of eminent domain powers. Once a coal slurry pipeline is cloaked in a declaration of national interest, preserving state water law becomes a monumental and probably impossible task. The compelling solution to this dilemma is to address the questions raised by Sporhase in a comprehensive and careful review of Western water law, deferring this far-reaching proposal in the meantime.

Mr. Chairman, the arguments advanced in favor of this legislation have changed repeatedly over the years, and all of them have been found wanting.

Ten years ago, this legislation was "needed" because of a predicted boom in coal. But that boom has not materialized on schedule. The railroads are amply equipped to handle any additional traffic that may be reasonably foreseen.

Two years ago this legislation was "needed" because of the rampaging rate of inflation. Coal slurry pipelines, being capital-intensive, have lower labor costs than railroads over time. But now inflation is abating, and those benefits are less compelling.

Now this legislation is "needed" because of the high rate of unemployment. Coal slurry proponents claim that a vast number of new jobs will be created by pipelines. This turns their previous argument precisely on its head and also ignores the OTA's conclusion that total cumulative employment by slurry pipelines and railroads until the year 2000 would be roughly equivalent with or without slurry pipeline development. In addition, slurry construction jobs would be temporary; lost railroad jobs would be permanent.

Mr. Chairman, none of the arguments in favor of this legislation stands up to scrutiny. There is no need for it and no benefit to be gained from it--indeed, S. 267 is contrary to the national interest. I strongly urge the Committee to reject it.

Senator **Warner**. Thank you very much, Senator. I concur in your observation about the small coal operators. I quote from the "Coal Operators' Weekly" in Beckley, W. Va., that said the small coal operators' position is that they feel the advent of the slurry pipeline will help kill the remaining small independent coal mines in our area.

We thank you very much, and I will turn to my colleagues to see if they have any questions.

Senator **Wallop**. Mr. Chairman, I do, I would like to insert in the appropriate place in the record an opening statement with regard to some of the issues that were raised by Senator Danforth.

[The prepared statement of Senator Wallop follows:)

PREPARED STATEMENT OF HON. MALCOLM WALLOP, A U.S. SENATOR FROM THE STATE OF WYOMING

Good morning. We are meeting here again today for the ninth year once again to consider the issue of federal eminent domain for coal slurry pipelines. As it was last year, it is of critical concern to me when I consider the many issues relating to the Coal Distribution and Utilization Act of 1983 the ability of Western states to control the use of their water resources without federal interference.

My stand on the issue of coal slurry pipelines and the use of water remains the same. If the bill does not contain language absolutely protecting the inviolate right of a state to manage and control its waters without a hint of Federal infringement and involvement, I will lead the fight against its passage. In this regard I am happy to be able to say that as introduced, the bill does contain the water amendment I authored last year pertaining to "Primacy of State Water Law". It is my sincere hope that the purpose of this language remains in the bill throughout its consideration by Congress.

To understand the strength of my position on coal slurry and western water, those of you who are not from the west must realize that at no time and in no place in recent history has water been so critical an issue in the west. Water, or the lack of it, from the beginning of time has been a factor in the rise or destruction of civilizations. Although man has learned to divert, store and conserve water, he cannot create more than naturally exists.

Lack of adequate water in the west where it is needed for energy as well as for competing industrial, municipal, agricultural, and environmental needs is a major problem. Topography and climate makes water abundant in one area and non-existent in others. Yet emphasis on Western energy development and an influx of people as a result, is stressing this unabundant resource to the breaking point.

To understand the extent of that stress you must understand that in many areas of the arid to semi-arid west, the potential evaporation exceeds the annual precipitation. Compared to the East, which has an average annual precipitation of 44 inches the west, by comparison, contains 60% of the nation's land area, receives but 7 inches of the approximate 30 inches of water which annually falls in the United States. Of the 170 billion gallons per day of water withdrawn in the East, 88% is returned. In the West, to the 165 billion gallons per day withdrawn, only 48% is returned. This difference is primarily due to a greater percentage of the total water withdrawn in the West for irrigation that is lost. However, the point is that the west is facing a long term diminishing water supply. Throughout most of the western states streamflows are declining. Yet, precipitation is remaining essentially constant.

With this in mind it is easier to understand why the water issue has been the fly in the ointment where the passage of the coal slurry pipeline bill is concerned in past Congresses. While the 51,200 acre feet of water per year it has been calculated as necessary to transport 64 million tons of coal per year through four 36-inch pipelines may not appear to be a great deal of water, nonetheless from a state management perspective the cumulative effects of energy development could be potentially devastating. This is particularly true if you are talking about the arbitrary confiscation through federal eminent domain authority of water under a state regulated water system where Congress has historically deferred to conformance with state law in the acquisition of water for federal projects.

Because I believe that certainty of right and expectation is the glue that binds western state economies together, last year I authored an amendment to the coal slurry pipeline bill the intent of which is to preserve, inviolate, the right of a state to manage and control its water free from federal interference where coal slurry pipelines were concerned. This amendment, which has been retained in S. 267 this Congress was designed to accomplish the following objectives:

First, to insure that the use and appropriation of water for all interstate coal slurry pipelines, not just those that use the right of federal eminent domain, be made pursuant to the law of the state where the diversion takes place.

Second, to insure that if a state denies a water permit or exercises conditions on such a permit or authorization, up to and including termination, that this exercise will not be prohibited as an unreasonable burden on interstate commerce.

Third, to insure that nothing in this can be construed or inferred as granting the United States or its agents a new right to use water.

Fourth, to insure that federal reserved water can only be used in a coal slurry pipeline, if state law is fully complied with, and

Fifth, to provide that nothing in law shall alter in any way any provision of state law or interstate compact.

Without these assurances I remain convinced that the whole coal slurry question becomes a catastrophe for the states with them the question takes on some real character. Now that the Federal District Court for the State of New Mexico has interpreted the precedent in Sporhase v. Nebraska to find New Mexico's abosolute ban on water exports in El Paso v. New Mexico to be unconstitutional on commerce clause grounds because of its "protectionist" nature, the importance of crafting a provision that leaves nothing to the imagination of any court in the land cannot be overemphasized.

I therefore urge our witnesses today to carefully analyze the legal effects of this amendment in light of the Sporhase and El Paso decisions and to give this Committee the benefit of their views as to whether or not the protective effects this language seeks to achieve are, indeed, achieved.

Senator WALLOP. It may be, Senator, that your observation about the section 7 needs to have some language to address it and make clear that section 5 when it comes to water is preeminent and it certainly is the intent of the legislative history that the water is protected.

I am curious to know where you got the figure a ton of coal for a ton of water. I think that is very much in contrast to what has been standard.

Senator DANFORTH. I think it is generally accepted, and I am not sure that this is the most scientific source or not. It is clearly an interested source, but the testimony before the House committee by the American Railroads Association used that.

Senator WALLOP. What organization?

Senator DANFORTH. The American Railroads Association testimony in the House used that.

Senator WALLOP. I would suggest that may not be the most unbiased figure.

Senator DANFORTH. I admit that it isn't. However, I don't have any particular engineering skill to make the judgment, either.

Senator WALLOP. I think generally speaking that for coal-fired plants, steam-generating plants, an acre foot of, about 7 feet of water per ton of coal as opposed to—I mean the reverse. Steam-generating plants run about 7 times as much in the water consumption as do slurry pipelines, so in effect in our part of the world a steam-generating plant is nothing but a slurry pipeline in disguise because it has all the same elements of it. Somebody exports the energy. Somebody else consumes the water and the profits generally belong to a corporation that is not in state. If you care to look at it, the water is just as gone at the conclusion of the steam generation product, process, as it is for the coal slurry. In each instance it is totally gone. The resource is gone, and the energy has been transported out of State, so they are not all that different in terms of their effect on us except that steam-generating plants usually couples up with a lot of human beings and a lot of environmental impacts over and above the water.

Senator DANFORTH. Senator Wallop, I believe that the question is whether this coal is going to be transported by means of a pipeline or by means of rail.

Senator WALLOP. Or by means of wire? I mean we do it now by wire as well as by rail.

Senator DANFORTH. Yes. Well, that may be, but I think that insofar as it is transported by slurry pipeline it is fair to say that a significant amount of water is to be used. Even in Missouri there is some concern now about the availability of water, not so much from the standpoint of the current state of affairs in our State, but if there is going to be any kind of foreseeable development in the State, the need for water is recognized. I am sure, I mean I am more a bystander than anything about what is going on in the West, but I know the concern in the western part of the country for the availability of sources of water, and the question is if the pipelines are built and if they are operating and if they are using large quantities of water and the States subsequently decide that there is an emergency or there is a prior need, can the States then get into the position of interrupting the water which is going into the pipeline and using it for other purposes? And I think that the answer in this legislation is clearly no.

Senator **Wallop**. Well, there I would really part company with you because the answer is clearly yes if the State does put a series of restrictive covenants on the use of the water prior to giving the water right. That was the whole purpose of the exercise we went through last year, and you may recall if you read those hearings, the hearing record or attended any of it, that both Dr. Trelease and the other witnesses forecast with great accuracy the Sporhase decision and tailored the language of this legislation to provide direct and immediate relief from that.

Senator **Danforth**. Senator Wallop, just based on your statement of last year which I fully understand and sympathize with about the need for, if necessary, a State to actually shut off water for the pipeline, it is clear at least to this former practicing lawyer that the language simply doesn't do it. It provides exceptions, and the exceptions stick out like a sore thumb, and basically it says that the States can do whatever they want provided that what they do doesn't affect the operation of the pipeline.

Senator **Wallop**. I go back to where we started this, and it may be that section 7 needs clarification with regard to section 5.

Senator **Danforth**. If you can do it.

Senator **Wallop**. The legislative history and the intent was to provide the States with Congress expression of relief from the commerce clause to the Constitution which all those constitutional experts say was within the purview of Congress to provide. It may be that we need to tighten that, but clearly without it, and here is where the problem comes, without it, our States and your State are naked in the face of our attempts to control our water with slurry pipelines. They may not have eminent domain, but as the ETSI experience clearly shows, they can acquire their rights-of-way with the tool of the courts when push comes to shove, and they have right straight on through, and so what you are faced with, we are faced with, is the situation where our States can't control. The *Sporhase* decision and the Colorado versus New Mexico and the El Paso versus New Mexico court decision has left us in the startling position where it is a damn sight easier to go prospecting for water in your neighbor State than it is to go at home, and what we don't have now is any protection at all for water.

The situation is catastrophic not only for western States, it would be correct to point out, but for our own, and I mean for your own and for those who think they live with a surplus. So it is my hope that we get clearly into the business and strengthen that water language if it needs to be, and I don't quarrel with it may need to be, but right now I would suggest to you that that is a better path and more valid one than it is proposing this legislation to provide the means by which your State, my State, and other States can make that decision whereas they cannot now.

Senator **Danforth**. Well, I think that the difference between passing this legislation and not passing this legislation is that if you don't pass the legislation, then the States have no power to determine the allocation of water without the existence and threat of a coal slurry pipeline.

If on the other hand you pass the bill——

Senator **Wallop**. I think that is a mistaken judgment, in my opinion, because clearly what has happened with Sporhase is that they do not have the ability to stop slurry pipelines because they will be in direct contravention of the commerce clause of the Constitution.

Senator **Warner**. Senator Wallop, we have now been here a half hour. I think the Chair would prefer an opening statement maybe of 2 minutes' duration, but before our colleagues leave, do you have questions of Senator Danforth?

Senator **Johnston**. Yes. Thank you, Mr. Chairman. Senator Danforth, in spite of your apparent opposition to this bill, I have hope for you because when you see the facts I think you will come around.

In that respect, I invite your attention first on this question of water law to the distinguished panel which is going to testify just after you. It really is a distinguished panel and I think after you hear them you will be reassured.

One of the points you make is that under section 7——

Senator **Ford**. Could I ask the Senator a question? Is the distinguished panel for or against the slurry pipeline?

Senator **Johnston**. They are going to show that——

Senator **Ford**. They are for?

Senator **Johnston**. The provisions of the bill with respect to water do preserve a State's right in the most effective way possible I think is exactly what they will say, but I will let them speak for themselves.

Senator Danforth, the exception you refer to when you say "unless it would prohibit" a coal slurry pipeline does not refer to a State's water law. There are no restrictions on the State's water law.

Indeed, if I may read from the committee report of last year on the identical bill, at page 25 of the report it says this:

> The States are authorized by virtue of this section to deny the acquisition or exercise of a water right and to impose restrictions on water use, including terms and conditions terminating use on any interstate coal pipeline which may be unilateral impositions of otherwise unreasonable burdens on commerce. Such State law is intended to be insulated from attack under the commerce clause. The committee intends this section to be construed broadly.

So that what the committee has done is given to a State as the report indicates new powers that they do not now have.

Right now under *Sporhase* and the *El Paso* decisions, as well as other decisions, a State may not regulate the export of water except under those very limited circumstances set forth in *Spor-*

hase as public health. This, in turn, has been very narrowly construed. But they also say that the Congress can, as we have done in this statute, give to a State the power to regulate and indeed to prohibit exporting water for a coal slurry pipeline, and that is, as the report indicates, what we have done. So I would invite your attention to that panel who I think will reassure you in that regard.

With respect to the ETSI pipeline and the fact that the other States downstream on the Missouri River have not been consulted, I think you will find, first of all, that only about one-third of 1 percent of the flow of the Oahe Reservoir has been appropriated in that case. The amount is really not even measurable according to the experts. Second, I think you will find from the next panel that the best way to regulate this water is under State law or under the Federal common law doctrine of equitable appropriation. This doctrine measures appropriations according to their reasonableness or unreasonableness, and allows the courts to fashion a remedy. This apportionment is done more effectively and in a better way than can be done by the Congress. So I would invite your attention to that.

Finally, you are aware of a phenomenon called a captive coal shipper where there is no competition for shipping coal because the only possibility is a single railroad? You are aware that there is such a phenomenon?

Senator **DANFORTH**. Sure.

Senator **JOHNSTON**. That means yes?

Senator **DANFORTH**. Yes.

Senator **JOHNSTON**. Are you aware that the estimate on the percentage of those railroad shippers who are captive shippers is 85 percent?

Senator **DANFORTH**. No.

Senator **JOHNSTON**. Would you disagree with that?

Senator **DANFORTH**. I have no basis to agree or disagree.

Senator **JOHNSTON**. I think the studies would indicate that it is 85 percent.

You also are aware that where you have captive coal shipper, there is no restraint other than what the ICC puts on rates, are you not?

Senator **DANFORTH**. Yes.

Senator **JOHNSTON**. And do you know what those restraints are?

Senator **DANFORTH**. No.

Senator **JOHNSTON**. Would you be surprised if I told you that the ICC would permit rate increases of 15 percent per year above inflation? And if you don't use your 15 percent this year you can add it on next year? Are you aware of that?

Senator **DANFORTH**. I will let you answer your own rhetorical questions, Senator Johnston.

Senator **FORD**. These two lawyers are going at each other. That's fine.

Senator **JOHNSTON**. They may be rhetorical questions, but I think they bear on the proposition which you stated to be fact, and that is that this bill is not going to insure competition.

What I am trying to tell you if you are not aware of these facts, is that coal shipping is not competitive now. You have 85 percent of rail shippers as captive shippers who are subject to extortionate rates. If you want to know why the boom has not materialized in the use of coal, I think to a very large extent it is because of the hesitancy of people to use coal and get hooked as a captive shipper or captive user when they are subject to those kinds of extortionate rail rates. That doesn't sound unreasonable, does it?

Senator **Danforth**. Well, let me respond to a couple of points you have made.

First of all, with respect to the panel, I know that at least one of the law professors, I guess there are two law professors and maybe a couple of other lawyers, who are testifying, but I know that at least one of them is going to testify of his concern about the effect of State law under this bill. It is his position as I understand it, and it is my position, that the exceptions contained in the bill have the effect of vitiating any real responsibility or authority that is purported to be vested in the States by the bill.

It is almost a good news, bad news story. The good news is that the States are to have responsibility for governing the use of water. The bad news is that they can't govern the use of water if it affects the pipeline, and I think that that is to render the effect of the bill that is touted for it as being either zero or virtually zero.

Senator **Johnston**. I do hope you will listen to them. I don't think they will say that.

Senator **Danforth**. Listen to Mr. Corker and ask him the question if you would because I just, I mean it is my reading of the bill, and I think if it is not in the bill, what you put in the report language doesn't mean anything. I think that if the terms, the usual rule of construction is that if the terms of the bill are clear, whatever the intent of the Congress is as stated in report language, if it conflicts with the four corners of the bill, it isn't going to help very much.

Senator **Warner**. I wonder if we might have the benefit of the wisdom of the panel here? Have you finished?

Senator **Johnston**. Yes.

Senator **Danforth**. If I could just respond to the second point with respect to captives and who is a captive and who isn't a captive. I suppose that if a very large coal shipper, very large coal producer, had a pipeline that was accessible to him, and also a railroad accessible to him, he would certainly love the benefit of the competition, but how about the little guy off in the boondocks somewhere who is producing coal? What about that person? What about the person who would not have access to the pipeline who would have only access to railroads and if the railroads are having a difficult time because they don't have the profitable big shippers of coal anymore, they are either raising the rate or discontinuing services to the little guy, so I think that this is essentially an anticompetitive rather than a procompetitive measure.

Senator **Warner**. That's the central question I think to this debate this morning.

Senator Ford, did you have some observations?

Senator **Ford**. I have an observation. I don't have a question of the witness, but I think the questioning reminds me of a psychology exam. Over the years the questions remain the same but the answers change.

Senator **Warner**. With that notable observation, we thank you very much, Senator.

Senator **Danforth**. Thank you very much.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. I will make a 3-minute opening statement and we will proceed with the hearing. My State, Virginia, is split down the middle on this issue, and I find myself in the unique position of representing a State which is the only State in the Nation that has a statute specifically prohibiting the granting of State eminent domain authority for coal slurry pipelines.

As such, I have a deep sense of obligation to protect the integrity of the laws of the Commonwealth of Virginia. In order to protect the rights of my State and others, Federal eminent domain should only be granted in my judgment in extraordinary circumstances of national need.

The testimony presented last year did not in my judgment demonstrate such a need. It was principally for this reason that I opposed the legislation.

No consensus exists in Virginia about whether to build a coal slurry pipeline. The Virginia Coal Association, Virginia Surface Mining and Reclamation Association, and the Virginia Electric and Power Co. support the construction of a coal slurry pipeline. Indeed the eminent chairman is here to testify on behalf of the industry this morning.

The Virginia Coal Council and the Virginia Railway Association oppose building a coal slurry pipeline. Recently I met with Rich Trunka, the new president of the United Mine Workers. I went to his office to call on him and discuss my concern about unemployment in the Appalachian coal fields. While Mr. Trunka was not available to testify today, he is submitting a statement at my request for the record which I hope every member of the committee will study with great care.

The United Mine Workers strongly oppose this legislation because it is their views that coal slurry pipelines will not create more jobs in the coal fields. Likewise the American Association of Railroads, the Railway Program Institute, the Railway Labor Executives Association testify today about the potential loss of jobs to railroad suppliers and workers if coal slurry pipelines are constructed.

Now within my own State we are trying to reach consensus on this issue, and I want to enable my State to have that opportunity. In the recent session of the legislature, the Virginia Assembly defeated legislation to repeal the prohibition of State eminent domain authority of coal slurry pipelines. Legislation was also defeated which would give the State Corporation Commission the authority to determine if a coal slurry pipeline should be built in Virginia. Instead, the Virginia General Assembly appropriated $200,000 to study the development of a coal slurry pipeline in anticipation of action by the next session of the legislature.

I will submit the balance of my statement for the record, as Senator McClure's statement likewise will be put in the record.

Senator **Johnston**. Mr. Chairman, I have a statement which I will put into the record and not read at this time.

Senator **Warner**. I thank you. Senator Ford.

Senator **Ford**. I have no statement.

Senator **Wallop**. I have one that I ask be included in the record.

Senator **Warner**. All statements will be put in, and I appreciate the cooperation of my colleagues such that we can proceed with this hearing.

[The prepared statements of Senators McClure, Warner, Johnston, and Exon follow:]

OPENING STATEMENT OF SENATOR McCLURE

Good morning. Today the Committee is conducting a hearing on S. 267, the Coal Distribution and Utilization Act of 1983. The bill is virtually identical to S. 1844 as reported by this Committee during the 97th Congress. As such, it reflects the previous decisions made by this Committee on the relative balance between two vital national interests. (1) A desire to facilitate the construction of coal slurry pipelines found to be in the national interest through the granting of federal power of eminent domain. And (2) the critical importance of protecting the primacy of state water law despite the interstate nature of the pipelines. The Committee concluded that the interest in protecting the primacy of state water law was superior to the potential disruption which might occur in the flow of interstate commerce, and therefore adopted various amendments to protect state water law, including a provision to guarantee primacy through a delegation of Congressional power under the Commerce Clause.

Since the Committee last considered the coal slurry legislation, several cases decided by the Federal courts have caused growing concern among Western water interests. These include Sporhase v. Nebraska, El Paso v. New Mexico, and Colorado v. New Mexico. The first two cases, Sporhase and El Paso addressed the constitutionality of state water statutes in the absence of a direct delegation of commerce clause power by Congress, and concluded that both were invalid. The water provisions of S. 267 were intended to prohibit this result within the context of interestate coal pipeline development. I am pleased that our first panel this morning consists of distinguished water experts who will be able to advise the Committee on whether or not we adequately did carry out our intent. As I have said in my previous statements on this legislation, we from the West must be assured that water interests are fully protected in order to support the bill.

The last recent case which I mentioned, Colorado v. New Mexico, dealt with the doctrine of equitable apportionment and is being viewed as another cause for concern in what seems to be an evolving pattern of judicial invasion of the traditional role of Western states

IN CONTROLLING THE ALLOCATION OF WATER. COUPLED WITH THE INCREASING DEMAND FOR WATER RESOURCES FOR ENERGY DEVELOPMENT, AGRICULTURE, MUNICIPAL AND INDUSTRIAL USES AND THE GROWING SCARCITY OF SUCH WATER, THIS EVOLUTION IS CREATING AN INTENSE LEVEL OF DISCUSSION WHICH MOUNTS EVERY DAY. WHILE I BELIEVE WE MUST DISCUSS AND SEEK ALTERNATIVE ANSWERS TO THE OVERALL WATER PROBLEMS WHICH FACE US, I WOULD STRONGLY ADVISE THAT WE PROCEED GENERALLY AND IN THIS LEGISLATION WITH GREAT CAUTION IN PROPOSING ANY SOLUTIONS, LEST WE CREATE A CURE WHICH IS WORSE THAN THE DISEASE ITSELF.

HAVING STATED MY VIEWS ON WATER, I WANT TO ADD THAT I ALSO BELIEVE THE NATION MUST PROMOTE OPPORTUNITIES FOR ENERGY SELF-SUFFICIENCY AND COMPETITION AMONG THE ALTERNATIVE MODES OF TRANSPORTATION NEEDED TO DELIVER RESOURCES TO EVENTUAL USERS. HOWEVER, WE MUST ALWAYS BE MINDFUL OF THE EFFECT OF THESE EFFORTS ON PRIVATE INDIVIDUALS, STATE-FEDERAL RELATIONS, THE FREE MARKET AND COMPETITION, AND THE ADVANTAGES AND AVAILABILITY OF OTHER RESOURCES.

I AM PLEASED TO WELCOME TO THE COMMITTEE THIS MORNING MY DISTINGUISHED COLLEAGUE FROM MISSOURI, SENATOR DANFORTH AND I UNDERSTAND THAT SENATOR BAUCUS WILL ALSO JOIN US A LITTLE LATER IN THE MORNING. I ALSO WELCOME THE MANY WITNESSES WHO HAVE COME TO TESTIFY BEFORE THE COMMITTEE.

BEFORE RECOGNIZING SENATOR DANFORTH, I WANT TO RECOGNIZE SENATOR JOHNSTON, THE DISTINGUISHED SPONSOR OF S. 267 AND ANY OTHER MEMBERS OF THE COMMITTEE WHO WISH TO MAKE OPENING STATEMENTS. I ALSO WANT TO TAKE THIS OPPORTUNITY TO COMMEND SENATOR JOHNSTON FOR HIS COOPERATION AND PATIENCE IN SCHEDULING THIS HEARING AT A TIME WHEN INTERESTED MEMBERS OF THE COMMITTEE AND OUR WITNESSES COULD BE AVAILABLE. THAT COOPERATION HAS CREATED A POSITIVE ATMOSPHERE FOR CONSIDERING THIS MOST COMPLEX LEGISLATION, AND WE THANK HIM.

"COAL SLURRY PIPELINE ACT"-S.267

SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES
Room SD 366
STATEMENT OF SENATOR JOHN W. WARNER
March 14, 1933 - 10 a.m.

Since becoming a member of the Senate over four years ago, I have worked steadily to promote American coal production. Each step towards increased use of domestic coal takes the United States and its Allies a step away from dependence on OPEC oil.

Last year when this committee considered legislation to grant Federal eminent domain for coal slurry pipelines, I opposed the legislation. The testimony did not convince me that granting Federal eminent domain for coal slurry pipelines was in the best interests of my state - not the Virginia coal industry or Virginia consumers.

Virginia is the only state in the nation with a state statute specifically prohibiting the granting of state eminent domain authority for coal slurry pipelines. The Virginia statute reads: "...the right of eminent domain shall not be exercised for the purpose of acquiring lands or estates or interests therein nor any other property for the construction, reconstruction, maintenance, or operation of any pipeline for the transportation of coal."

As the elected representative of the people of Virginia, I have a deep sense of obligation to protect the integrity of the laws of the Commonwealth of Virginia. In order to protect the rights of my state and others, Federal eminent domain should only be granted in extraordinary circumstances of national need. The testimony presented last year did not demonstrate such a need to me, and it was principally for this reason that I opposed the legislation.

No consensus exists in Virginia about whether to build a coal slurry pipeline. The Virginia Coal Association, the Virginia Surface Mining and Reclamation Association, and the Virginia Electric and Power Company support the construction of a coal slurry pipeline. The Virginia Coal Council and the Virginia Railway Association oppose building a coal slurry pipeline.

I recently met with Rich Trumka, the new President of the United Mine Workers, to discuss my deep concern about unemployment in the Appalachain coal fields. While Trumka was not available to testify today, he is submitting a statement for the record which I hope every member of this Committee will study with great care before casting his vote. The United Mine Workers strongly oppose this legislation because it is their view that coal slurry pipelines will NOT create more jobs in the coal fields.

The American Association of Railroads, the Railway Program Institute, and the Railway Labor Executives Association testify

TODAY ABOUT THE POTENTIAL LOSS OF JOBS TO RAILROAD SUPPLIERS AND WORKERS IF COAL SLURRY PIPELINES ARE CONSTRUCTED. THERE IS NO DOUBT THAT UNEMPLOYMENT IS THE MAJOR PROBLEM FACING THE UNITED STATES TODAY. TO RESPOND TO THE DEMANDS OF AMERICANS FOR MORE JOBS, WE ARE DEBATING ON THE FLOOR OF THE SENATE THIS WEEK AN EMERGENCY JOBS BILL. AT THE SAME TIME, WE ARE TRYING TO PASS A BILL ON THE FLOOR TO CREATE JOBS,WE ARE PUSHING THROUGH A BILL IN THIS COMMITTEE TO ELIMINATE RAILROAD JOBS AND COAL MINING JOBS. I WILL LEAVE IT TO THE PROPONENTS OF THIS LEGISLATION TO EXPLAIN THE LOGIC OF OUR ACTIONS.

WITHIN MY OWN STATE OF VIRGINIA, WE ARE TRYING TO REACH A CONSENSUS ABOUT COAL SLURRY PIPELINES. IN ITS 1983 SESSION, A COMMITTEE OF THE VIRGINIA GENERAL ASSEMBLY DEFEATED LEGISLATION TO REPEAL THE PROHIBITION OF STATE EMINENT DOMAIN AUTHORITY FOR COAL SLURRY PIPELINES. LEGISLATION WAS ALSO DEFEATED WHICH WOULD HAVE GIVEN THE STATE CORPORATION COMMISSION THE AUTHORITY TO DETERMINE IF A COAL SLURRY PIPELINE SHOULD BE BUILT IN VIRGINIA. INSTEAD, THE VIRGINIA GENERAL ASSEMBLY APPROPRIATED $200,000 TO STUDY THE DEVELOPMENT OF A COAL SLURRY PIPELINE IN VIRGINIA.

I AM LOOKING FORWARD WITH GREAT INTEREST TO THE RESULTS OF THAT STUDY WHICH WILL BE AVAILABLE BY EARLY 1984. WHILE VEPCO HAS FINANCED ITS OWN STUDY ON THE FEASABILITY OF A COAL SLURRY PIPELINE AND THE VIRGINIA RAILWAY ASSOCIATION HAS PAID FOR A PIPELINE STUDY, THIS NEW REPORT WILL BE THE FIRST NOT FINANCED BY AN INDUSTRY WITH A DIRECT INTEREST IN THE PIPELINE. I COMMEND THE VIRGINIA GENERAL ASSEMBLY FOR APPROVING THIS STUDY.

I AM COMMITTED TO PROTECTING VIRGINIA'S RIGHT TO DECIDE IF A COAL SLURRY PIPELINE SHOULD BE IN OUR STATE.

I AM ALSO COMMITTED TO INSURING THAT THE CAPTIVE SHIPPERS--SUCH AS MANY COAL PRODUCERS--ARE PROTECTED FROM EXCESSIVE TRANSPORTATION COSTS. RECENTLY, THE INTERSTATE COMMERCE COMMISSION ISSUED TWO DECISIONS WITH A POTENTIALLY DRAMATIC IMPACT ON THE AMERICAN COAL INDUSTRY. THE ICC VOTED TO DEREGULATE FRIEGHT RATES FOR EXPORT COAL AND TO DEREGULATE RAIL BOXCAR TRAFFIC. THESE TWO DECISIONS ALTER THE RELATIONSHIP BETWEEN RAILROADS AND COAL PRODUCERS. THEY HAVE THE POTENTIAL TO INCREASE FREIGHT RATES AND THE DELIVERED PRICE OF COAL, DRIVING UP MONTHLY ELECTRIC BILLS FOR CONSUMERS AND IMPAIRING OUR COAL EXPORT TRADE.

I AM WRITING TO THE CHAIRMAN OF THE SENATE COMMERCE COMMITTEE TO REQUEST THAT HE CONDUCT OVERSIGHT HEARINGS ON THE STAGGERS RAIL ACT AND HOW IT IS IMPACTING THE SHIPMENT OF BULK COMMODITIES, PARTICULARLY COAL. ENOUGH TIME HAS NOW PASSED SINCE THE ENACTMENT OF THE STAGGERS RAIL ACT THAT CONGRESS SHOULD EXAMINE HOW IT IS OPERATING AND IF ANY MODIFICATIONS IN THE LAW ARE NECESSARY.

I WELCOME THE WITNESSES THIS MORNING, PARTICULARLY THE WITNESSES FROM VIRGINIA, MY LONGTIME FRIEND, JUSTIN MOORE, THE CHAIRMAN OF THE BOARD OF VEPCO; AND LYNCH CHRISTIAN, A COAL OPERATOR FROM LYNCHBURG, VIRGINIA.

Statement of Senator Johnston

Committee on Energy and Natural Resources

March 14, 1983

Mr. Chairman, once again we are gathered together for a public hearing on the issues involved with the granting of Federal eminent domain rights to coal slurry pipelines. I am pleased at the early scheduling of this hearing, and I welcome the distinguished witnesses who will testify before us today.

Much of what we are about to hear and say will probably seem very familiar to us. I expect that today's testimony will reinforce the fact that coal slurry pipelines will provide enormous benefits to this nation in terms of reduced dependence on oil and gas resources, reduced coal transportation rates for utility customers, a greater ability to become competitive in the world coal export market, and the creation of hundreds of thousands of jobs through investments by private, not public, funds.

I also expect that we will receive testimony on a recent series of developments relevant to the coal slurry issue. Two highly significant court opinions have been rendered regarding the all important issue of States' water rights. This Committee will be most interested as to the effect, if any, that that the decisions in Sporhase v. Nebraska and El Paso v. Reynolds will have on the water law protections of S. 267. In this regard, it is a special pleasure to welcome back the three water law experts who testified before this Committee last June; Messrs. Clyde, Trelease and Widman. I would also like to welcome Professor Charles Corker from the University of Washington who will be joining the water law panel.

In addition to Court rulings dealing with the water issue, a number of significant legislative and administrative decisions have been rendered. Earlier this year, the Virginia legislature failed to repeal its existing ban on the building of coal pipelines in that state, an occurrence which clearly demonstrates the need for eminent domain rights at the Federal level.

The Interstate Commerce Commission has also rendered two major decisions regarding domestic coal transportation. The first deals with coal transportation rates for "captive shippers", i.e. those with no other effective means of transportation is available other than by railroad. This decision, *Ex Parte 347*, would allow rail rates charged to captive shippers to escalate at a rate of up to 15% per year *over and above* inflation. I suspect that this will serve to strengthen the desire of captive shippers for legislation which would offer at least an opportunity for competitive and more affordable transportation.

The second ICC opinion would serve to deregulate rates charged for the transportation of coal destined for export. This is particularly relevant in light of recent developments in the international coal market. Last year, plans were revealed for a major coal slurry pipeline project which would bring coal from the huge Siberian fields in the Soviet Union to markets in East and West Europe. Just last week it was revealed that a similar project is planned in which China would offer export coal to Japan. Thus, at a time when two of our main competitors in the world coal market, Russia and China, are announcing plans to undertake major slurry export projects, we have announced plans to take the lid off of the transportation rates for the only effective means we have to get coal into the export market. This fact is all the more ironic when one considers that much of the technology, expertise and capitol which will be used to undertake these foreign projects comes from American companies who are unable to enter similar projects at home. If we are to become truly competitive in the world market it is all the more important that eminent domain rights for coal pipelines become the law.

Finally, Mr. Chairman, the Senate will today consider an "emergency" legislative proposal designed to create jobs and relieve unemployment. The bill before this Committee today, S. 267, would likewise create jobs and relieve unemployment, but would do so without the expense of billions of Federal dollars.

If we are serious about addressing unemployment, if we are serious about becoming competitive in the world coal market, and if we are serious about efficient use of domestic resources in our efforts to become energy self sufficient, then we will quickly move to pass S. 267. I look forward to working with the Chairman and the other members of this Committee to do so.

STATEMENT BY
SENATOR J. JAMES EXON
ON
S. 267
RE: COAL SLURRY LEGISLATION
BEFORE THE
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
March 14, 1983

MR. CHAIRMAN and Members of the Senate Energy Committee, I am pleased to have this opportunity today to express my concerns regarding the pending legislation, S. 267, which seeks to grant the federal power of eminent domain to coal slurry projects.

As former governor of eight-years, I have had the fortunate experience to know my state's water needs and the resources which are available to meet those needs. As with many Plains and Western agricultural states, water is the lifeblood of the farm economy. This is why proposals such as S. 267 must be closely scrutinized to ensure that the scarce and vital water resources of this region are protected from indiscriminate waste; and that the states' rights and prerogatives to protect their water resources are not abridged.

In this regard, I am not convinced that the language of the "states' rights" provision of S. 267, adequately protects and preserves the states' prerogatives in water allocation from federal preemption.

I come before the Committee today to seek answers and assurances to questions which greatly disturb me regarding this proposal. My principal concern is the protection of state water rights. In addition, I have concerns about the specific application of eminent domain to coal slurry pipelines; the take-or-pay contracts required to finance slurry lines; and broader impacts of coal slurry development.

EMINENT DOMAIN

The granting of the public's power of eminent domain appears on its face to be a simple and succinct concept. As this Committee well knows, however, there is a complexity implicit in granting this public power for it involves the taking of private property for a public use without the owner's consent. In the case of coal slurry pipelines, these affected "owners" are not just railroads, but also individual land owners.

Slurry supporters argue that coal pipelines are deserving of the public's power to take private land because the railroads were beneficiaries of this authority. Viewed in a proper historical perspective, railroads were not given eminent domain to transport coal, but rather were given this power to extend civilization westward. Railroads were a new form of transportation not just for commodities of all kinds, but people as well. Since colonial times, highways were about the only beneficiaries of the public's power to take private property. Railroads were viewed as an extention of the public highway.

BROADER IMPACT

I would request that the Committee also examine the broad social impact of coal slurry development. The Congressional Budget Office has indicated in a letter to me that "there may be some substantial regional economic impacts as a result of construction of a coal slurry pipeline." Furthermore, the CBO has stated that "regions served by the pipelines may enjoy benefits at the expense of regions not served."

In elaborating upon these assertions, the CBO stated that there would be losses in employment in the railroad industry, resulting in a loss of tax revenues and increased outlays for unemployment compensation. Furthermore, prices of other commodities shipped by rail could rise. Energy prices may increase for those utilities that continue to receive coal by rail.

These significant regional impacts should be reviewed during the Committee's consideration of this legislation.

TAKE-OR-PAY CONTRACTS

Another issue of concern is a matter which the Committee has focused considerable attention on in another context, that being "take-or-pay" contracts. We have heard volumes of testimony regarding the havoc which these provisions have brought upon the natural gas industry. Coal slurry pipelines certainly would not be immune from the adversities of such "take-or-pay" provisions. I would request that the Committee review methods to minimize the problems and consequences to ultimate consumers where "take-or-pay" contracts threaten end-users.

WATER ISSUES

Finally, and most importantly, I believe that the current legislation fails to adequately address the protection of states' rights in water allocation. In light of recent federal court and U. S. Supreme Court decisions affecting a state's ability to controls its own water, I believe that this is a matter best left to the states to resolve in the first instance. The federal government should not impose itself into this arena until the states have determined the appropriate course of action.

Of course, slurry supporters state that the current legislation provides slightly more protection to a state then under current law. This may be correct, but only in the instance of the state which issues the water permit. States which share water resources employed for a slurry line are left totally out of the picture and without protection under the language of S. 267.

A principal deficiency of the proposal currently before the Committee is that it completely ignores the fact that water resources do not lie solely within the boundaries of one state. I know that the Committee would agree that the people of each neighboring state have an interest in such shared resources and that no one state should be allowed to make a disposition of a common resource for its sole benefit and to the detriment of the partner states.

The legislation before the Committee today permits unilateral action by a state sharing water resources with several states, and only fosters disunity among them all. The compact process is the preferred method of addressing such issues and granting federal eminent domain to slurry pipelines before the Western states have had an opportunity to come to grips with this problem in light of a barrage of recent court decisions appears unwise.

States are unsure, in light of Sporhase and El Paso, as to the extent to which they actually control their own water.

In addition, last year, the U. S. Department of Justice questioned the adequacy of the language in the proposal pending before the Committee to address water issues. On its face, the language employed is not specific enough to satisfy doubts which were raised by the Sporhase decision.

Another concern focuses upon a state's ability to terminate water use once a water permit has been granted to a slurry pipeline empowered with the public's authority of eminent domain. The Committee must address this fundamental issue, for such pipelines are "wrapped" in the cloak of the national interest in this proposal and it is questionable whether a state would have authority to terminate the water granted to a slurry pipeline if preferential uses are endangered by a shortage. This is a key protection for states.

A final concern focuses upon protections offered to future water legislation enacted by states. Water availability and demand will certainly change in the years ahead. More intense competition between agricultural and industrial uses will give rise to many problems and issues not yet envisioned under existing states laws. The Committee must provide for this in any legislation which will intrude federal authority into the area of state water rights.

FINAL POINT

I would raise one final point with the Committee which casts doubt upon the need for this legislation. The ETSI project has acquired nearly 90% of its needed rights-of-way without federal eminent domain.

CONCLUSION

This measure, S. 267, fails to adequately address many significant and far-reaching questions. The Committee has wrestled with issues which, I believe, only the states can answer in due course. The federal government is intruding into areas not fully considered and addressed in this legislation.

Federal legislation granting eminent domain authority to the coal slurry pipeline would seriously compromise the long-standing integrity of state control of water resources as well as the integrity of our precious water itself.

In light of the commerce clause implications inherent in designating coal slurry pipelines as national interest projects empowered with federal eminent domain authority, no language asserting a states' rights savings clause can adequately clarify and preserve the states' water rights beyond a reasonable doubt.

I thank the Committee for the opportunity to express my concerns on this subject.

Senator **Warner**. I understand that, Senator Wallop, you would like to introduce the first witness on this panel?

Senator **Wallop**. Mr. Chairman, it is a great pleasure to welcome back Dean Frank Trelease, formerly dean of the University of Wyoming Law School, a recognized expert on American water law. I started to say western water law but I believe his credentials, national credentials, clearly bring him to that statute of American water law, and he was very helpful to this committee last year, and I welcome him back this year, and I would imagine that we are going to have him on a panel, is that correct?

Senator **Warner**. Indeed he will be joined by Mr. Edward W. Clyde, counsel, Salt Lake City, Utah; Mr. Widman, counsel, Washington, D.C., for Fulbright and Jaworski; Charles E. Corker, professor of law, University of Washington; Thomas O. Claflin, professor of biology, University of Wisconsin.

Gentlemen, we welcome you, and we would like to have you, please.

STATEMENT OF DR. FRANK J. TRELEASE, PROFESSOR, McGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC, SACRAMENTO, CALIF.

Dr. **Trelease**. Thank you very much, Mr. Chairman, members of the committee, and thank you for the kind words, Senator Wallop.

Since my testimony last year I think the outstanding occurrence, of course, has been the *Sporhase* case, and it is very familiar to you and the committee, and I will not rehash it.

I do want to point out that it held three things.

Senator **Warner**. If I might interrupt you, your statement will be inserted in the record in its entirety, and we would appreciate your offer to condense it.

Dr. **Trelease**. I will give only the highlights. The State ownership of water is a legal fiction, and the State limitation on the export of water is in serious danger of being declared an unconstitutional restraint on interstate commerce, and I would like to speak to that business of legal fiction—the State ownership of water.

I know that the States don't really own the water the way a person owns a farm or an automobile.

Senator **Johnston**. I wonder if the dean would pull the microphone up a little?

Dr. **Trelease**. I was saying that I know the State doesn't own water the way you own a farm or an automobile, but State ownership was invested in the State of Wyoming in the State constitution of 1889 when the pioneer idea of appropriation of water was to go out and dig a ditch and take the water. That's all you needed. We saw in Wyoming that that was not enough. The State ought to concur, and by claiming to be the owner of the water and saying that we will only dole water out, the State water out, we were able to get control over the appropriation of water and make sure that it went to the public interest, and what is in the public interest of the State?

The courts have said that what is in the public interest is that which will maximize the contribution of the water use to the welfare of the State, and if there have been competition between water users—two people want the same water for different projects—the courts have said the State must choose that project which will produce the greater net benefit, and so this has been a most important concept in the development of State water law, and although it is a fiction, it is a fiction which the Supreme Court itself says is a fiction expressive in legal shorthand of the importance that a State have power to preserve and regulate the exploitation of an important resource, and now this notion that the water should serve the public interest has been given primarily to people called State engineers, State water commissioners or something, but the legislatures of the States are very well equipped to declare what is in the public interest of a State, and in light of these very large new developments caused by the energy crisis and the interest in coal, the legislatures of several States have taken back the part of this ability to control what is in the public interest, and so Wyoming enacted this statute requiring the legislative approval for the export of ground water.

South Dakota required legislative approval of all applications to appropriate more than a thousand acre—pardon me—10,000 acre-feet per year, and that has the same effect, but these statutes haven't created real barriers. The same statute in Wyoming made an exception at the very beginning and gave the permit to the ETSI Pipeline Co. South Dakota has given the water to a conservancy district which has made a contract with the ETSI Pipeline Co.

These are not restrictions, real restrictions. They are not unreasonable restraints on interstate commerce, and there are some new laws. I understand that the Wyoming Legislature just last week passed a law that says that export of water will have to stand the test of an analysis based on economic, social, environmental, and other benefits to be derived from the State contrasted with the benefits to the State that will be foregone by this appropriation, that we must insure these users will not interfere with other planned uses.

Now these clearly spell out to make more definite this notion of the public interest limitations, and I would like to urge that this sort of condition is really a reasonable condition. I think it is in grave danger. I believe that the *Sporhase* case makes them, probably makes them, would classify them as an unreasonable restriction.

I know that the *El Paso* case which was a very, very restrictive reading of *Sporhase,* would say these are not permissible. The El Paso judge allowed only those restrictions that were in the public health and safety.

Now I think water is different from other commodities. I know that it would be unreasonable to say put an embargo on the export of coal, but if a resident of Wyoming has a farm and he gets a water right and he grows crops and if he ships all the produce out of State, both exporting States and receiving States enjoy the benefit of free trade and commerce.

The same is true of a factory which ships all of its products out of the State. The State of origin benefits from an increase in the property values and labor and secondary benefits to local merchants and the establishment. It receives property taxes, income taxes, sales taxes. When coal is mined for export, the mine produces similar benefits, but if water is simply shipped out of the State, the State loses not the value of the water but a means of producing wealth. Part of the State's capacity to produce wealth is lost; 20,000 acre feet of water a year will provide a slurry pipeline, or it will irrigate about 6,000 or 7,000 acres for a community of farms.

Now if the State has to make a choice, it seems to me that it is reasonable that it get something in place of the contributions it would lose if it gives the water to a pipeline instead of to the farm, and I don't think it is unreasonable or impermissible to require the export of water to give something in return, to leave something behind, and this is the upshot of the Wyoming/South Dakota solutions. In both States, the laws not only provide for the regulation and control of water and pipeline, but they set forth a means of financial compensation for use of water, and the pipelines are willing to live with that.

Now if we are going to legalize these restrictions, and *Sporhase* says that the Congress can do that, then the question comes up is the bill sufficient?

We now have the exact language of the *Sporhase* before us, and Senator Danforth pointed out it does require that the congressional intent to legalize a restriction on commerce be expressly stated, and I think that there might be some massaging of the language of the bill to more expressly state the fact that you are intending to legalize waters that relate to the export and use of water outside of the State of origin, and that relate or limit the export of water for the use in slurry pipelines.

I think that the Congress can see the desirability of the sort of export restrictions the States have already imposed and the coal slurry pipelines can live with them. The States have very real and important reasons for imposing them. I believe Congress should agree that these are reasonable and permissible conditions and I am sure that the Supreme Court would regard the passage of S. 267 as the final word on that matter.

[The prepared statement of Dr. Trelease follows:]

PREPARED STATEMENT OF DR. FRANK J. TRELEASE, PROFESSOR, MCGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC, SACRAMENTO, CALIF.

Mr. Chairman and Members of the Committee: On June 8, 1982, I testified in favor of S.1844 (97th Congress), the predecessor of S.267. The emphasis of my testimony was on the adequacy of that Bill to protect state water laws and to ensure that coal slurry pipelines could not override state water laws even if they were given federal powers of eminent domain in and of interstate commerce in coal. Other interests, primarily the railroads, sought the defeat of the Bill on the ground that state water law was endangered by the Bill. It was argued that the interstate commerce clause of the Constitution precluded the imposition by the states of restraints on export of water and of conditions on permits for appropriation of the water needed by an interstate coal slurry pipeline. At that time the case of Sporhase v. Nebraska was pending before the Supreme Court, and there was much speculation as to what it would hold and whether it would apply to this situation. On July 2, 1982, Sporhase was decided. (102 S. Ct. 3456 (1982)). We now know that the Nebraska statute that required a permit to export ground water from the state was invalid to the extent that it conditioned the grant of the permit on the existence of a reciprocal privilege in the receiving state. Since Colorado, the state in which Mr. Sporhase would use the water from his Nebraska farm, forbids the exportation of ground water, the Nebraska permit was withheld. This, said the Supreme Court, made the Nebraska law an impermissible burden on interstate commerce. It did not say, however, that all export restrictions would contravene the Commerce Clause, and it indicated several possibilities that certain types of limitations could be sustained. In the course of the opinion, the Sporhase case established three propositions: (1) that state ownership of water is a legal fiction, not a reality that prevents water from being an article of interstate commerce, (2) that although some state restraints on export of water may be valid, the Nebraska requirement of a reciprocal law in the receiving state is an impermissible restraint on commerce and (3) that none of the existing federal laws recognizing and requiring the use of state water law validates those state water laws that impose burdens on commerce.

On January 17th, 1983, the United States District Court in New Mexico decided the case of City of El Paso v. Reynolds, in which the judge enjoined the New Mexico State Engineer from enforcing a New Mexico statute that prohibited the withdrawal of water from underground sources in New Mexico for transportation and use outside the state. Giving a severely restricted reading to the Sporhase decision, the judge ruled that only "health and safety" considerations would justify a state's retention of water "essential to human survival." All the rest was said to be an economic resource, with the result that interstate commerce in it could not be embargoed. The El Paso case illustrates how restrictively Sporhase can be construed, how strictly the courts may regard restraints on commerce.

These cases do not change the essential nature of my last year's presentation. The outcome of Sporhase was then predicted. The major point of my testimony dealt with the problem of how to neutralize the interstate commerce objection, how to reverse Congressionally a Supreme Court ruling that a particular type of state regulation was an unreasonable burden on interstate commerce. This year I only wish to change the emphasis. The Supreme Court has long recognized that Congress, not the courts, is the regulator, and that Congress may regulate by permitting states to act. Though the Court may say that a state law is a restriction on commerce, Congress may say, yes, but it is a desirable restriction. I therefore want to show the history behind and the reasons for the terms and conditions the states have imposed on coal slurry pipelines, why these are matters of legitimate concern to the states, and why Congress should remove the stigma of "unreasonable and impermissible" from them.

STATE OWNERSHIP AND THE PUBLIC INTEREST

The Sporhase opinion dismisses state ownership as a "legal fiction." No one understands the truth of this better than I, for a quarter of a century ago I pointed out that there are logical fallacies in trying to build a system of water law on theories of "ownership." Trelease, Government Ownership and Trusteeship of Water, 45 Cal. L. Rev. 638 (1957). But I pointed out that the laws themselves, standing on their own feet, were sound, and that thought has never been better expressed than by the Supreme Court, in the Sporhase case itself, when it quoted earlier cases holding that state ownership was a fiction,

"...but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource."

Preservation and regulation were first cast in terms of "state ownership of water" by the state of Wyoming. In pioneer days the appropriator simply took the water, dug a ditch, applied the water to beneficial use. In 1889 the territorial engineer of Wyoming, Elwood Mead, pursuaded the pioneer framers of the state constitution to adopt state ownership of water as basic rule. (Wyo. Const. Art. 8, S 1.) In tho following year the first session of the Wyoming legislature implemented this concept with a permit system for initiating appropriations. No longer would water rights be created solely at will of the appropriator. The appropriator had to apply for a permit to construct the works and take the water of the state. A government official or agency was to decide whether there was unappropriated water for the use, and dole out the share of water needed. Most important, this 1890 legislation declared a new policy: the state was to hold back its water, deny the application, if to grant the permit would be "contrary to the public interest." (Wyo. Const. Art. 8 S 3, Wyo. Stat. S 41-4-403.) The permit system and its public interest limitation has since been adopted in almost all of the states of the west, indeed in many eastern states and in foreign countries.

There are not many cases that call the public interest limitation into play. This is for a very good reason, for practically all the farmers, miners, power companies, manufacturers and cities who put to use the water of the west had a practical, wealth producing, beneficial use in mind. All advanced the development of the resources of the country. Each was an increment toward maximization of the welfare of the people, the state, and the nation, so each was in the public interest. There was very little direct competition for water in the sense that simultaneous demands were made on the stream, hence little need to allow some projects and deny others. The law of priority settled each right in turn.

When competition did occur, the public interest was used to decide who got the water. The courts recognized that this was more than a simple question of private interest to be governed by priority. Instead of giving the water to the first applicant, it was early held that the state must give the water to the applicant with the best project. In New Mexico, two applicants sought the same water for different projects. The court said that the water officials must try to secure the greatest possible benefit from the public waters for the public, and must therefore choose the better project, the one that would produce the greater benefits. Young & Norton v. Hinderlider, 15 N.M. 666, 110 P.1045 (1910). In Utah, the first applicant sought a permit for a power project, but this would cut the heart out of a proposed multi-purpose project for power, irrigation and municipal supply. The court said the state engineer must subordinate the smaller project to the larger, though the smaller one had been applied for first. Tanner v. Bacon, 103 Utah 494, 136 P.2nd 957 (1943). When the competition was between an appropriator who wished to take water from a stream and environmentalists who wished to preserve fishing and recreation, the permit, rather than being denied, was conditioned to accommodate both. Bank of America v. State Water Resources Control Board, 42 Cal. App. 3d 198, 116 Cal.Rptr. 770 (1974). Recently, the North

Dakota court decided that the state should not wait until activity in the private sector results in competition. The state water officials were told to hold up granting water permits for coal-related power and energy production until a comprehensive plan for conservation and development of the state's natural resources was undertaken. United Plainsmen Ass'n v. No. Dak. Water Cons. Comm., 247 N.W. 2d 457 (1976).

The legislature is probably better equipped to decide and declare what is in the state's public interest than an administrative official or board, and a number of state legislatures have held back or taken back a part of this function. The energy crisis reawakened interest in the large beds of western coal. The burgeoning coal industry brought new problems to the water-short west, and several states reacted with new laws. Wyoming enacted its statute requiring legislative approval for the export of ground water (Wyo. Stat § 41-3-115), and South Dakota required legislative approval of all applications to appropriate more than 10,000 acre feet per year (S.D. Comp. L. § 46-5-20.1).

These statutes have not created real barriers to commerce by slurry pipelines. The Wyoming legislature approved a permit for ETSI to take 20,000 acre feet per year simultaneously with its enactment of the statute that "prohibited" the use of surface or ground water as a medium of transportation of mineral, chemical or other products to another state. Wyo. Stat. § 41-3-115 (b). The statute has since been amended to impose additional conditions on ETSI, but these are mere procedures and sanctions for determining and preventing injury to other water users. (Wyo. Stat. § 41-3-115(g)(h)(j) and (k)). Wyoming's legislature also gave conditional approval to store water in a large reservoir to another slurry pipleline company, provided a satisfactory arrangement could be made for sharing the reservoir with Wyoming irrigators, municipalities and industries. Wyo. Stat. § 41-2-301. South Dakoka solved the problem to her satisfaction by creating a state-controlled conservancy district to appropriate the water and contract to supply it to "energy industry users," on terms that might include money payments and sharing the water with the people of the state.

These are not vicious conditions, in my view, not "unreasonable" restraints on interstate commerce. But they do impose burdens on exporters that are not imposed on in-state users, and while it can be argued that they could be sustained, the presumption seems against them. It is true that the Sporhase opinion did not proscribe all conditions and restraints, indeed, the court indicated that a state's interest in the conservation of water and the protection of its public welfare might support "a limited preference for its own citizens."

With these qualifications in mind, the Wyoming legislature has recently amended its export procedures with two new enactments. One bill modifies the state's procedure for legislative approval of exports. It declares, "The legislature finds, recognizes and declares that the transfer of water outside the boundaries of the state may have a significant impact on the water and other resources of the state. Further, this impact may differ substantially from that caused by uses of water within the state." The bill exempts transfers of less than 1,000 acre feet. It eliminates a requirement for reciprocity. Most importantly, it requires the state engineer to submit to the legislature a comprehensive analysis and recommendations, based upon

"...the economic, social, environmental and other benefits to be derived by the state from the proposed appropriation; the benefits to the state by the use of the water within the state that will be foregone by the proposed appropriation; ...whether the use ...promotes or enhances the purposes and policies of the state's water development plans and water resources policy, and ....will not unreasonably interfere with other planned uses or development for which a permit has been or may be issued; whether the proposed use will significantly impair the state's interest and ability to preserve and conserve sufficient quantities of water for reasonably foreseeable consumptive uses and other beneficial uses recognized by law, to include but not limited to domestic, livestock, agricultural, municipal and industrial purposes." (House Bill 0241, 1983, amending Wyo. Stat. § 41-3-115.) A second bill grants preliminary approval for the export by "commodity pipelines" of saline water and sewage effluent, subject to a similar analysis prior to final approval. (House Bill 0352A, 1983, to create Wyo. Stat. § 41-2-701). It can be seen that these new laws spell out and make more definite the same concepts contained in the broader, more comprehensive but less specific "public interest" limitation the state has had since 1890. They do make it clear that after the economic, social and environmental analysis has been made, an in-state development, planned or prospective, may be preferred over a proposal for the export of water. Is this the "evenhandedness" required by Sporhase? Will these stand up when considered in the light of Sporhase? They certainly do not meet the strict test of "health and safety" imposed in El Paso.

I fear for them. I therefore believe that it would be both legitimate and desirable for Congress to regulate commerce by encouraging coal slurry pipelines in S.267, while at the same time providing in that bill that the water the pipelines will use must make the same contribution to the welfare of the state made by all other water users within the state. Water is different from most articles of commerce. If a resident or a nonresident buys a farm within the state, procures a water right from the state, grows crops and ships all the produce out of the state, both the exporting state and the receiving state enjoy the benefits of free trade and interstate commerce. The same is true if a factory uses the water in its processes and ships all its product out of the state. The state of origin benefits from an increase in property values, labor and secondary benefits to local merchants and service establishments; it receives property taxes, income taxes and sales taxes. When coal is mined for export, the mine produces similar benefits, and severance taxes as well. But when a water right is acquired for export from a state with limited water supplies, the state looses not the value of the water but a source of continuing wealth. A water right given to an exporter results in a limitation on state growth. The state is poorer for having lost not the substance itself but part of the state's capacity to produce wealth. Twenty thousand acre feet of water per year will irrigate six or seven thousand acres — a community of farms — or supply a slurry pipeline. If the state must allocate the water to the pipeline, it ought to get something in place of the contributions it loses from the forgone farms. I think Congress can and should declare that it is not an "unreasonable" or an "impermissible" restraint on interstate commerce to require the exporter of water to give some quid pro quo, to leave something behind.

This is the upshot of the Wyoming and South Dakota solutions. In both states the laws not only provide for the regulation and control of water used in coal pipelines but set forth a means of financial compensation for the use of water. South Dakota will receive $1800 per acre-foot, while Wyoming intends to receive payments ranging between $100 and $400 per acre-foot, depending on the source of supply. The pipeline enterprises are willing and able to make these payments.

THE SUFFICIENCY OF S.267

Since I testified last June, two new factors have been added. First, much of the language of S.1884 was changed when the Bill was reported out of Committee, and the changes are carried over into S.267. Second, we can now judge the new Bill by the exact language of the Sporhase opinion.

S.267 is an improvement on the old draft of S.1844. It now contains Sec. 2 (a), paragraphs (7), (8) and (9), that praise state water law and recite that the national interest requires that pipeline systems be developed only in the context of state water law and interstate compacts, notwithstanding the potential burden on interstate commerce. Section 2 (b) requires that such development be consistent with state water law and interstate compacts. Section 3 (2) modifies this slightly by adding, "Access to water for the operation and maintenance of the pipeline shall be governed by state laws and procedures except where application of such state laws and procedures would have the effect of prohibiting such access." Eligibility for a determination that an interstate coal pipeline distribution system is in the public interest is limited by Sec. 4 (a) (1) to an enterprise that has filed and secured approval of a water permit or right for the appropriation, use or diversion of water as provided in Section 5. Section 4 (2) says that the power of eminent domain granted by the act will not include the right to take, use, dispose of or develop water. Section 5(a) is somewhat improved over the original version of S.1844; it requires compliance with the "substantive and procedural law of the state relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights." Section 5(b) states that pursuant to the commerce clause, the establishment and exercise of terms and conditions on water permits shall be determined pursuant to state law. (Page 13, line 4, contains a glitch, either an omission or an incomplete deletion.) Section 5(c) declares that nothing in the act will affect the validity of any state law or interstate compact governing water rights or any law governing water quality, and eliminates the possible use of federal non-Indian reserved rights.

At this point, we must resolve all doubts as to validity of the present laws of the coal producing states, the present conditions on pipeline permits, the new state statutes, against their validity. We must assume (though not necessarily concede) that all are "impermissible" restraints on interstate commerce under the Sporhase and El Paso cases. What this Committee seeks to know today is whether S.267 is sufficient to legalize these restraints, even if they are now invalid under the Sporhase rule.

The last phase of the Sporhase opinion inquires into whether "...Congress has authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water." The Court looked at thirty-seven statutes in which Congress has deferred to state law, and at a number of interstate compacts that have been approved by Congress, but found in none of them an intent to remove federal constitutional restraints on the states, in none a consent to the unilateral imposition of unreasonable burdens on commerce. "In the instances in which we have found such consent," said the Court, "Congress' intent and policy to sustain state legislation from attack under the commerce clause was expressly stated." The question for the Committee today is, is S.267 sufficiently explicit to meet this test?

This question was addressed by Assistant Attorney General Carol S. Dinkins of the Department of Justice, Land and Natural Resources Division, in testimony before the Senate Environment and Public Works Committee on September 15, 1982. Noting that the language of the Bill was "not, standing alone, free from ambiguity," the DOJ memo concluded that the Committee Report on S.1844 made the intent of the drafters clear, and that the Supreme Court would "be likely to pay close heed to the guidance provided."

An opposing memorandum, unidentified as to authorship, dated 11/2/82 and entitled "S.1844 Affords Insufficient Protection For State Water Law," argues that S.1844, now S.267, might be treated like the statute involved in New England Power Company v. New Hampshire, 71 L.Ed.2d 188 (1982), where the Federal Power Act recited that it "...shall not deprive a state of its lawful authority now exercised over the exportation of hydroelectric power." Congress, the Supreme Court reasoned, did no more than defer to existing valid state laws and did not intend to legitimize bans on exportation that would otherwise be impermissible. The 11/2/82 memo urged that "...the language of S.1844 ... remains vulnerable to precisely the interpretive approach adopted by the Supreme Court in that case."

This criticism may also apply to conditions attached to permits granted to pipelines. Section 5 (b) of S.267 states: "Pursuant to the Commerce Clause in Article I, Section 8 of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions... on permits or authorization for the reservation, appropriation, use, or diversion of water for any interstate coal pipeline distribution system shall be determined pursuant to the law of the state granting such permit or authorization." This will certainly allow conditions such as those created by this year's Wyoming legislative addition to Wyo. Stat. S 41-3-115, which establish a detailed procedure for investigations, enforcement orders and corrective measures for complaints that coal slurry pipelines in operation are injuring or interfering with prior or preferred water users. But is it sufficient to legalize terms and conditions like those Wyoming offered to the reservoir applicant — "you can have the permit for slurry export if you make part of the capacity of your works available to local farmers, cities and industries?" Or like South Dakota has imposed on ETSI — "pay a great deal of money for the water and also give part of it to South Dakota residents?" Does Sec. 5(b) meet the Sporhase requirement of an "express statement" that these are now legalized?

Although I agree with the Assistant Attorney General that the legislative history ought to make this clear, perhaps the Committee, or Congress, will wish to remove all doubt. One method would be to abandon the assumption that the catch-all phrase "state water law" includes all present and future state restraints on exports of water. Sec. 2(a)(8) of S.267 might be amended to refer to, "state water laws and compacts, including laws relating to the export and use of water outside of the state of origin." Sec.

5(a) might require slurry pipelines to comply with "the substantive and procedural law of that state relating to the control, use, place of use, export, disposal or distribution of water." Sec. 5(b) might add, in line 4 page 13 after "terms and conditions," the phrase, "relating to or limiting the export of water for use in coal slurry pipelines." Such amendments would surely be held to meet the "express statement" requirement of Sporhase.

Such action by Congress, legalizing in this fashion the laws, terms and conditions on export of water as they relate to coal slurry pipelines, might be thought preferable to waiting for litigation testing each state statute and condition, and the wording of S.267, and hoping for favorable results.

The amendment might take some other forms. The DOJ memorandum states four basic avenues which Congress could follow: "First, Congress could pass generic legislation which established guidelines as to what types of state export restrictions were permissible and which were not. Second, Congress could simply pass a law which listed all current state statutory export restrictions and authorize them pursuant to its Commerce Clause power. Third, Congress could address the propriety of burdens on interstate commerce created by state laws in the context of narrow factual circumstances. Fourth, Congress could enact legislation designed to spur the establishment of interstate compacts on the theory that interstate compacts are the best legal avenue for the efficient and equitable resolution of interstate water disputes."

I suppose that the first could be done, but there may be dangers in including a very broad section on water policy in a narrow bill on coal slurry pipelines. Great care would have to be taken, after study of all possible kinds of export regulations, for all sorts of purposes, applicable to many different situations. The favorable report of S.1844 indicates that the Committee feels that the slurry pipelines can and should live with the kinds of restraints they now face. Whether that can be extrapolated to a statement of broad guidelines for to permissible and impermissible restraints in other contexts, I leave to the Committee. The second suggestion, to list the state laws legitimatized, would be awkward and restrictive, and would freeze the existing situation and prevent additions and amendments. The third suggestion seems to describe the path the Committee has thus far taken — to approve a narrow section that seems right for coal slurry pipelines. The last suggestion, to leave the matter to state negotiation of interstate compacts, does not seem very realistic to me. After El Paso I'm not sure how much trading stock New Mexico can muster in bargaining for a favorable deal.

CONCLUSION

The Supreme Court in Sporhase had before it a narrow set of facts, a seemingly senseless bar to an otherwise desirable export of water — one man, whose farm straddles a state line, trying to irrigate the Colorado part from a well on the Nebraska side. Nevertheless, what the Supreme Court said raises doubts about other restrictions on water exports that do make sense in the slurry pipeline context. Congress now has before it a desirable bill to enable the pipelines to obtain their rights of way. Congress can see the desirability of the type of export restrictions the states have imposed. The coal slurry pipelines enterprises can live with them. The states have very real and important reasons for imposing them. I believe that Congress should agree that these are reasonable and permissible conditions, and I am sure that the Supreme Court would regard the passage S.267 as the final word on that matter.

Senator **Warner**. We thank you very much.
Mr. Clyde.

STATEMENT OF EDWARD W. CLYDE, COUNSEL, CLYDE, PRATT, GIBBS & CAHOON, SALT LAKE CITY, UTAH

Mr. **Clyde**. Thank you. My name is Edward W. Clyde. I live in Salt Lake City, Utah, and for the benefit of those that perhaps don't remember, I was here last year. As an attorney for ETSI, a consultant that they use in water matters, I negotiated the South Dakota contract with them for the particular coal slurry line.

The positions that I took before the committee last year and the position I am taking today are views that I have long held and frequently published, and the cases I am pleased to say that I cited as long ago as 1959 as law in this area are cases decided as recently as 2 weeks ago in the U.S. Supreme Court in a commerce case. I think I would like to talk about *Sporhase* and the *El Paso* case and the most recent water apportionment case against just a little backdrop in the past.

When the Mormons went to Utah and the gold rush people went to California, the land in the West was owned by the Federal Government. There were no statutes where these settlers could get title either to land or water. They just went on the land and used it and Congress acquiesced in it. When the initial users got into disputes with each other, one group argued the riparian rights doctrine. The water ought to be left in the stream under the riparian rights doctrine, and the other group seeking to take the water out of the stream and take it to other lands, the courts correctly held there wasn't a true riparian owner. The State owned the land. Neither of the water contestants did, and they had to devise some other system of water law to determine the right of use of the water.

The principles they developed were not unusual. Possession is nine-tenths of the law even between thieves. The first thief has the superior right as between trespassers. Awarding the water to the first user was not all that unusual.

As we developed the Homestead, the Pacific Railway Act and the Mining Act in the early 1840's or 1860's, we did have a true riparian owner and here and there the courts were deciding the rights in favor of the riparian owner and taking the water away from the prior person. Some States said the riparian rights doctrine simply isn't adaptable to the semiarid country of the West and they rejected it out of hand. If, however, the patentee of the land had in fact gotten the water with the land from the proprietary owner which was the Federal Government, there were due process questions, and Congress in 1877 adopted the Desert Land Act which the State supreme court said, recognized that Congress was the proprietary owner. It had the power under the property clause to dispose of the land and water together or separately. The Desert Land Act made it clear it wanted to dispose of the water separately from the land, that the patentee of the land got no interest in the water.

The courts of the Western States particularly, and there are many States in the U.S. Supreme Court, saw that they were freed to administer the allocation and the use of water in the West.

Congress had in 1866 adopted a statute that still is in effect that appropriated water according to State law. You have the consent of Congress to do it and the right will vest, and somebody who has perfected such a right does hold a vested right which is protected by the due process clause if it is taken or compensable.

We have had, however, over the last 75 years conflicts between the Federal interest and the State interest. The first major inroad was the reservation of water for the Indians. That reserve rights doctrine was extended to other Federal withdrawals. There are some problems that by their very nature they are Federal and they ought to stay there. Local problems have been left by Congress in the courts with the States. The States in the past when I started practicing law 40 years ago were trying to get a comprehensive bill taking all the power away from the Federal Government. It fortunately didn't pass.

I think there were two things. One, whatever sovereign powers Congress has it can't convey away as a matter of fundamental constitutional law. The case that says that is *Cooley* v. *Board of Wardens* in 1851. It was cited by me in 1959 and by the Supreme Court more importantly in *Sporhase,* and the relationship between the State and the Federal Government is working. It is working reasonably well. The States are basically in control of the allocation process. They basically control change applications. They administer the streams. Even Indian water rights that are under Federal control have been assigned a priority so they can be administered in the priority system.

When Congress adopted the National Reclamation Act in 1902 it mandated that the Bureau get its water by complying with State law. The Bureau fought that from time to time, but a couple of years ago in the *United States* v. *California* the Supreme Court said it means what it says—comply—and so we have a priority system basically at work. We have the power of the Federal Government to intervene when it needs to.

I think we would never have successfully gotten Lake Tahoe without hurting Lake Meade if Congress hadn't adopted filling criteria. We call upon Congress to build our Federal dams, and because we ask them to build them, Congress leaves the control in the Secretary of the Interior, but we are getting along reasonably all right.

The first question that we addressed last year is does the language of the bill leave the State water law intact? And I have no question at all that it does. The places where the courts have made inroads on State control or where Congress has neglected to be express in what it intended, and they have implied an intent to Congress to get a desired result sometimes; they have implied an intent to Congress that you can't find in the Congressional Record, but this bill says that it is not the intent of Congress to interfere with the State appropriation of water, and anyone who wants to use the eminent domain power granted with this bill has got to get its permits under State law.

I think *Sporhase* merely says what I think is obvious, that we are deferring by this bill and other bills, have deferred to the State to balance State law—not invalidate State laws. Congress can't authorize the States to violate the Constitution, but in the commerce area, the commerce clause is a negative clause. It has given the power to Congress to regulate commerce, and it is inferred that excludes the States, but the *Board of Wardens* v. *Cooley* says in 1851, and it is a very well-reasoned case, that the manner in which Congress discharges this commerce regulation power is for Congress, not the court. If Congress sees fit to discharge that responsibility by adopting State laws, it can do so.

In that case the States by widely differing statutes were regulating the licensing of pilots who guided ships into harbors, and Congress adopted those State laws to regulate that. The court said without that congressional endorsement of the laws, they would be unconstitutional interference in the commerce clause. With that congressional blessing, they are valid.

The U.S. Supreme Court in the case I picked up in the newspaper just before I came out—it was decided February 28, 1983. It involved a statute, an ordinance with the city of Boston that kept the jobs for the Boston citizens. The contention was that that violated the commerce clause. Congress had consented to it, by the way. It had appropriated Federal funds, and the court said it didn't, but this language I think is pretty germane here and it is less than 2 weeks old. Where State or local government action is specifically authorized by Congress, it is not subject to the commerce clause even if it interferes with interstate commerce, citing *Southern Pacific* v. *Arizona*, a case I cited for that point in 1959.

Senator WARNER. Mr. Clyde, I am anxious to move along. Could we have a wrap-up here? During the questions I'm sure you will have an opportunity to make other points.

Mr. CLYDE. Yes. What I think, if the Congress wants to defer to States like they have in Wyoming and some other States, limiting export of water, I think it has the abundant power to do so. That power will run afoul of the interstate apportionment cases because if you apportion a river, 50 percent to each of two States, and they fully develop, and then you can export water from one State to the other, you will distort the apportionment. That has got to be dealt with.

Thank you.

[The prepared statement of Mr. Clyde follows:]

PREPARED STATEMENT OF EDWARD W. CLYDE, COUNSEL, CLYDE, PRATT, GIBBS & CAHOON, SALT LAKE CITY, UTAH

My name is Edward W. Clyde. I live at 1329 Blaine Avenue, Salt Lake City, Utah.

I am in the private law practice and specialize in the field of water law. I testified before this Committee last year at a hearing on S. 1844. A copy of the statement I filed then is available, and I ask for permission to refile it. It contains a more detailed statement of my experience in this field.

I do desire specifically to note that I am a consultant to Energy Transportation Systems Inc. (ETSI) in regard to its acquisition of water for its coal slurry pipeline project and was the lead attorney in negotiating its water contract with the State of South Dakota.

Last year I addressed the question of whether or not the language in S. 1844 was adequate to assure that the water needed for coal slurry projects which use the federally granted power of eminent domain for right-of-way acquisition would be acquired under state law. It is now my understanding that there has been some expressed concern that Congress, through the enactment of the proposed legislation (now S. 267), will be seen by the courts as having interjected itself into the allocation of water, a process which has historically been left with the states. It is my opinion that the language in S. 267 is completely adequate and that no court could reasonably conclude that Congress, by this legislation, intended to interfere with the states in the allocation of water for such projects.

It has been my long-held view that the federal-state water conflicts need to be resolved as a matter of policy — not of power. Congress acquired most of the land in the West through the exercise of its sovereign powers. The Louisiana Purchase (1803), the Oregon Compromise (1846), the Mexican cession by the Treaty of Guadalupe Hidalgo (1848), the boundary settlement with Texas (1850) and the Gadsden Purchase (1853) are the principal examples.

The power of the United States to control its public lands and water rests both on the fact of proprietary ownership and on the sovereign powers of the federal government under the Constitution. Article IV, Sec. 3, clause 2 of the Constitution vests in Congress the power "to dispose of and make all needful Rules and Regulations respecting the . . . property belonging to the United States." This constitutional language was explained and applied in Alabama v. Texas, 347 U.S. 272, 273, 98 L.Ed. 689, 74 Sup. Ct. 481 (1954) reh. den. 347 U.S. 950, 98 L.Ed. 1097, 74 Sup. Ct. 674 (1954), as follows:

> The motions for leave to file these complaints are denied. Article IV, §3, Cl. 2, United States Constitution. United States v. Gratiot, 14 Pet. 526, 537, 10 L. Ed. 573: The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation." United States v. Midwest Oil Co., 236 U.S. 459, 474, 35 S. Ct. 309, 313, 59 L. Ed. 673: "For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor

> therein. Congress 'may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale.' . . ." United States v. City and County of San Francisco, 310 U.S. 16, 29-30, 60 S. Ct. 749, 756, 84 L.Ed. 1050: "Article 4, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' ". United States v. California, 332 U.S. 19, 27, 67 S. Ct. 1658, 1663, 91 L. Ed. 1889: "We have said that the constitutional power of Congress [under Article IV, § 3, Cl. 2] is without limitation."

Pursuant to this power Congress has adopted a number of federal statutes permitting the appropriation of water for private use. (Act of July 26, 1866, ch. 262 §9, 14 Stat. 253, Rev. Stat. §2339, 30 U.S.C. 51; Act of July 9, 1870, ch. 235, §17, 16 Stat. 218, Rev. Stat. §§2339, 2340, 43 U.S.C. 661; Act of March 3, 1877, ch. 107, 19 Stat. 377, 43 U.S.C. 321-323.) These various statutes did not convey away the federal government's proprietary rights to the water on the public lands. Rather, they are more in the nature of an "offer" to the public. The statutes permit the waters to be appropriated by following state law and local custom. Until the water is so appropriated, however, the ownership rights relating to water on the public domain continue in the United States. If the United States elects to withdraw the unappropriated waters on federal lands and set them aside for federal or other designated uses, there is no theoretic reason why it cannot do so. However, if a private appropriator has perfected a water right in accordance with state law, the right vests. The federal offer has been thus accepted, and generally speaking the right cannot be taken by the federal government, or by anyone else, without compensation. See Hunter v. United States, 388 F.2d 148 (C.A. 9 Cal. 1967). Even where property rights are encroached upon through the exercise of a treaty power, it appears that the taking is compensable. See Prevost v. Greenaux, 19 How. 1 (1857).

As I noted in the statement I gave last year, there are a number of bases for Congress to assume jurisdiction over western water as a matter of power. One is the above noted federal proprietary interest. Among the other sovereign powers are the power (a) to regulate commerce (which has been extended to nonnavigable tributaries which can affect navigation); (b) to make treaties; (c) to provide for the general welfare; (d) to provide for the national defense; (e) to regulate the use of water reserved to the Indians; and (f) the power to authorize interstate compacts. These powers have existed from the beginning and the United States Supreme Court has held in Cooley v. Board of Wardens, 12 How. 299, 319 (1851) that Congress cannot by statute alienate these federal powers. While the case is an old one, it was cited with approval by the U. S. Supreme Court in July of 1982, in Sporhase v. Nebraska, which is noted below.

However, for more than 120 years the Congress of the United States has recognized that most of the problems relating to water allocation and use are local in nature and ought to be controlled by the states. Congress, accordingly, has generally deferred to the states on water allocation. It must be recognized, however, that in the very nature of things there are some problems which are federal. Obstacles constructed across navigable streams have to be regulated if navigability is to be protected. The licensing and regulation of such structures is thus a federal problem, and is placed under the control of Congress by the Constitution. However, the power to regulate and license such structures does not need also to embrace control over the appropriation of project water. The use of water from a stream ought to be administered under a single system insofar as this is possible. Users of water above and below the licensed dam will have initiated their rights under state law. It will in no way interfere with the federal government's power to protect the navigability of streams to require the procurement of a federal license for the obstruction, and then to require the securing of water rights in accordance with state law. This, for example, was the scheme provided for on reclamation projects by Sec. 8 of the National Reclamation Act of 1902.

The federal government itself is, and ought to be, vitally concerned with the development of the West. A doctrine which will encourage the continued appropriation and use of the unappropriated water is in the common interest of us all. History has demonstrated the local nature of most water problems. Still there are situations where the problem is federal in nature and the power has been vested under the federal system with the federal government. Where the Constitution grants to Congress the power to legislate, it may discharge its legislative function by adopting state laws, present or prospective. See United States v. Sharpnack, 355 U.S. 286 (1958); Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946). Congress may also remove the obstacles to state legislation, which will permit the state itself to legislate directly upon the subject. Butte City Water Co. v. Baker, 196 U.S. 119 (1905); and In Re Rahrer, 140 U.S. 545 (1981), but Congress cannot relinquish its sovereign powers by statute to the several states.

The Commerce Clause doctrine arises out of a negative inference from the Constitutional grant of power to the U.S. Congress and is really an implied, rather than express limitation on the state interference with interstate commerce. As the U.S. Supreme Court stated in Southern Pacific Company v. Arizona, 325 U.S. 761, 769 (1945), since it is Congress' power to begin with, Congress has the power to "redefine the distribution of power over interstate commerce" so as to "permit the states to regulate commerce in a manner which would not otherwise be permissible . . . ." In the case of Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946), the Supreme Court upheld the concept that Congress has the power to consent to State regulation of commerce even though that regulation would otherwise run afoul of the dormant Commerce Clause.

The Southern Pacific Company case was cited with approval by the U.S. Supreme Court in a decision rendered February 28, 1983. The court there said

> where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). Thus, if the restrictions imposed by the city on contruction projects financed in part by federal funds are directed by Congress then no dormant Commerce Clause issue is presented.

White v. Mass. Council of Const. Employers; Cited 43 CCH S. Ct. Bull. P., p. B1183.

The court in Sporhase inquired as to whether Congress had authorized the Nebraska restriction, clearly implying that if it had the Nebraska statute would not be unconstitutional.

Thus, if Congress wants to approve the restrictions in States like Wyoming and South Dakota which require legislative approval of permits to export water, it clearly can do so. In fact this is similar to what was done in Cooley v. The Board of Wardens, 12 How. 299, (1851) which in turn is cited with approval by the court in Sporhase. There Congress approved state statutes on licensing of pilots which but for the Congressional approval would have been an improper state restriction on commerce.

Congress, if it wants to address this problem and permit the states to restrict the export of water for use in coal slurry pipelines would in my opinion be better served if it by statute permitted state restrictions which would reasonably protect or compensate the state of origin for the economic interest it has in having the water put to beneficial use within the state.

When Congress acts, its intent in regard to the appropriation of water under state law, or the withdrawal of unappropriated water for federal use, ought not be left to implication. Legislation should leave with the federal government the power to regulate and control in the areas where the problem is federal, but in most cases, the federal interest can be protected while still leaving with each state the right to develop its own system of water law. We have had our National Reclamation Law for more than 80 years and it has functioned well under a scheme where the Secretary of the Interior has been directed by the express terms of the National Reclamation Act of 1902 to secure project water by making water filings under state law. The Missouri River and its tributaries have largely been developed under the Flood Control Act of 1944 and in that Act Congress has provided that navigation should be subservient to the consumptive use of water in the states. What is needed here is a clear statement by Congress that water for coal slurry pipelines should be obtained under state law and that Congress, by adopting the coal slurry legislation, has not intended to interfere with the state's traditional water role. The language of S. 267 clearly does this.

The above is consistent with the testimony I gave last year. Since that time there have been three cases which should be noted. The most noteworthy is Sporhase, et al. v. Nebraska, ex rel. Douglas, Attorney General, __ U.S. __, 102 S.Ct. 3456 (decided July 2, 1982). I prepared an in-depth analysis of that case in a letter prepared for the use of the Committee, dated July 12, 1982. I have the impression that this may have been informally presented to some Members of the Committee, but I request permission to file a copy as a part of my testimony. In the Sporhase case, Nebraska had a reciprocal statute which would permit Nebraska water to be used outside the state if the sister state had a reciprocal statute. It prohibited out-of-state use otherwise. The U. S. Supreme Court held that this was an unconstitutional restriction on interstate commerce. In so holding, the majority opinion indicated three bases for Congressional control of water.

First, the court noted the multi-state character of the Ogallala Aquifer and said that the interstate nature of the aquifer confirms the view that there is a federal interest in conservation, as well as in the fair allocation of the diminishing resource — citing Arizona v. California, 373 U.S. 546 (1963). In that case the Supreme Court held that Congress had the power to apportion the waters of an interstate stream and that by adopting and implementing the Boulder Canyon Project Act it had allocated the Lower Basin waters of the Colorado River among the Lower Basin states.

Secondly, the court notes that Congress has the power under the commerce clause to regulate a ground water basin.

Third, the court notes that the overdraft of the Ogallala Aquifer is a national problem and Congress has the power to deal with it on that scale. It is this statement which could give the states the greatest concern, but the court has long held that Congress has the power to provide for the general welfare and can do so in the field of water law. See Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958), where the court said that in developing those water projects, the United States had expended federal funds for a valid public and national purpose — the promotion of agriculture. "This power flows not only from the General Welfare Clause of Art. I, Section 8 of the Constitution, but also from Art. IV, Section 3, relating to the management and disposal of federal property."

A fourth basis, not mentioned by the court in Sporhase, but which, in my opinion, might also support federal regulation of some ground water basins, would be that some of the ground water could be unappropriated and located within federal land and thus regulated under the property clause. There really should be nothing alarming in any of these concepts. The conflict comes when Congress exercises these powers. These federal powers have always existed and there are previous cases upholding Congress, where it has used these powers. The Sporhase decision does not make new law, except to suggest in a statement, which I think is dicta, that the doctrine of equitable apportionment, which for 75 years has been applied to interstate streams, also applies to interstate ground water basins. I think such a holding is desirable, for we do have underground basins which cross state lines. One state can, through overdevelopment, interfere with the development of a sister state and the same type of conflict which has developed on surface streams is developing on ground water aquifers in several places in the United States.

The second case is City of El Paso, et al. v. S. E. Reynolds, individually and as State Engineer of New Mexico, et al., (decided Jan. 17, 1983 by the U. S. District Court for the District of New Mexico). In that case the City of El Paso filed 326 applications for permits to appropriate up to 296,000 acre-feet of water annually from underground basins in New Mexico. New Mexico's constitution precludes utilization of New Mexico ground water outside the borders of the state. The District Court, following Sporhase, held the New Mexico ground water embargo violates the commerce clause of the U. S. Constitution and that an order should be entered enjoining the defendant from enforcing it.

The El Paso case avoided a conflict with a compact on an adjoining stream by finding factually that the ground water basins involved were not tributary to that stream. Had they been, an interesting problem would have been presented, which brings me to the third case. It is Colorado v. New Mexico, 103 S.Ct. 539 (decided Dec. 13, 1982). This case involved the waters of an interstate stream. The Special Master found that most of the water from the stream is being consumed by the New Mexico users. None was being used in Colorado. He recognized that a strict application of the rule of priority would not permit Colorado any diversion since the entire available supply is needed to satisfy the demands of existing appropriators in New Mexico. He also found that the uses in New Mexico were to some extent wasteful and the case was sent back to the Master for more detailed findings in regard to that. However, the court rejected New Mexico's claim that it was entitled to all the water because of the build up of prior rights. In so holding, the court stated that there is a federal common law principle which entitles Colorado to an equitable portion of the stream and that some water should be allocated to Colorado. The case is of interest here, in that the interstate movement of water, as permitted by Sporhase, will ultimately conflict with an interstate apportionment made by court decree, by Congress, or by compact. For example, if an interstate stream were apportioned and each state fully developed its apportioned share, the interstate movement of water thereafter would decrease the apportioned share of one state and increase use above the apportioned share of the other. This may not necessarily occur before the states reach full development. An appropriation made in Colorado for use in New Mexico, for example, could be charged against New Mexico's allocation, but if after full development someone with a vested right wanted to sell a Colorado right for use in New Mexico, and New Mexico were already using its full apportioned share, the application of the rule of Sporhase could have the effect of changing the apportionment. This will require an examination as to whether the apportionment is for the state, to provide jobs, develop its resources, provide municipal water, etc. The apportionment cases read as though apportionment is for the benefit of the state. This is a problem which will have to be addressed in the future, because water is being moved in ways which will ultimately bring us squarely to this point.

The Indian water is also here and there getting quantified, and the problems of using Indian water off the reservation for non-Indian uses is another problem where the law is far from adequately developed. Another area where there will be significant development in the law involves ground water, such as the right of the early appropriators to be protected in ground water levels and artesian pressures, or problems regarding recharge of the basin.

In my opinion, it would be difficult in a single bill to solve these and the many other unresolved federal-state problems. I would personally prefer to see a case-by-case approach. Thus, in conclusion, it is my opinion that the water cases which have been decided by the federal courts in the past year really have not taken the law in any new direction. The federal powers over water have not changed, nor been enlarged. There is nothing in the decided cases which suggest that the language of S. 267 will not preserve the traditional role of the state in the allocation of water. If Congress adopts the legislation with this language intact, it will have made it crystal clear that Congress has not intended thereby to intervene in the state processes for allocating water for coal slurry pipelines. California v. United States, 438 U.S. 352 (1980); and Imperial Irr. Co. v. Yellen, 447 U.S. 352 (1980) strongly suggest that the courts will honor that expressed interest.

Senator WARNER. Thank you very much.

Mr. Widman of Fulbright & Jaworski, Washington, D.C.

STATEMENT OF GARY L. WIDMAN, COUNSEL, FULBRIGHT & JAWORSKI, WASHINGTON, D.C.

Mr. WIDMAN. Thank you, Mr. Chairman. It is a pleasure to be back with you again to examine some of these issues on the water rights provisions in the coal slurry legislation.

My background includes teaching as a professor of water law at the University of Denver and various times at the University of California, the Hastings Law School, and now counsel with Fulbright and Maworski, and represent the parties who are advocating or opposing this legislation.

Your staff had asked me to look at the legislation to see if there were ways in which it could be strengthened to better protect the water rights of the State.

By way of background, I think I should say I share most of the views that have been expressed already by Professor Trelease and Ed Clyde, particularly Mr. Clyde's description of the power that this committee has to deal with the interstate commerce issue.

It seems to me that that still leaves you with the *Sporhase* decision offering very general guidance to the States who attempt to do something on their own. While the *Sporhase* court decision says that it is possible for an arid State to enact legislation constitutionally which will prohibit all export of water, it doesn't say very much more than that, and it is hard to know precisely how arid something has to be before it is sufficiently arid to be valid, constitutionally valid, used as a valid constitutional basis for restricting exports.

It is not clear if the State has to be in deficit at the time the legislation is enacted, that demand has to outstrip supply, or if it is sufficient for demand to outstrip supply in 20 years, 50 years. It is not clear what bearing the cost or relative cost of alternate supplies, both in the exporting and importing areas, might be, and so there are problems here which very definitely could benefit from the attention of this committee, and in the interests of promoting certainty and planning of large-scale projects such as a coal slurry pipeline, it certainly does seem worthwhile to set out standards for validating State legislation or to just explicitly validate it.

In dealing with the draft bill that you have, similar to what was produced last year, and comparing it with the House version which the hearing was held last week, first in your section 2—this is one of your pieces of legislation where section 1 is section 2—section 2 has several provisions discussing the findings in relation to water law, particularly subparagraphs 7, 8, and 9. It seems to me that those paragraphs very clearly express your findings related to interstate commerce and your reasons for saying that you need the type of provision that you have here protecting State water laws, and it seems to me that that is a useful provision to have in the statute, and the House bill as it currently stands does not have a similar provision.

I have made several comments on some of the intervening provisions in sections 3 and 4. Of course, the primary clauses that we are dealing with are in section 5, and here I have again considered that we should take care of this problem about what would happen if a court should pass, try to pass on this legislation and decide whether or not it effectively gave the State legislation priority over the interstate coal pipeline.

For example, this concern arises as we discussed last year with cases like first Iowa where it appeared that the Supreme Court was willing to go along with the congressional deferral to State law until it actually interfered with the construction of a project. As Mr. Clyde pointed out and Dr. Trelease and I pointed out last year as well, it seems to me that if the congressional intent is sufficiently explicit, that the court will have no problem in validating State law, but in order to make it sufficiently explicit, it seems to me that either the legislation or the report—and of course last year you did have report language that says this. This year you don't have that report yet, but somewhere in one of the two, preferably in the statute, you should make it clear that the State water law provisions will prevail even if it means that the coal slurry pipeline project will not be built. In other words, you face hard questions which the court could be expected to face to give an indication of your intent of how you want to answer it.

I also suggest that you include in it the definition of the term "State water law," and that will streamline some of the drafting of some of the subsequent provisions. It would also make it clear that the water law that you are protecting or I think reconstitutionalizing is the term from last year, are those provisions of the State law that include administrative regulations, hearings, and decisions made by representatives of the State who are empowered to make discretionary decisions, and this type of provision, too, should be included as part of the State law if I understand your intent correctly.

I pointed out several places where you could explicitly refer to export or export restrictions as well as laws that deal with claimed use, diversion, and so on.

There is a reference in subsection c(l) to not altering the provisions of the existing interstate compacts. This business of apportioning the flow of interstate streams between States has become a very controversial issue in this context, and it seems to me that you would want to also include mention of the possibility of judicial or congressional allocation and your intent not to alter those measures for allocation as well.

Subsection 4 protects Indian reserve rights. There is no comparable provision in the House bill. It seems to me that those rights would not be affected by this legislation in any case, but there is certainly no harm in making it explicit in section 4, and I have various other comments on some of the language, suggestions that I think will make it more effective.

[The prepared statement of Mr. Widman follows:]

PREPARED STATEMENT OF GARY L. WIDMAN, COUNSEL, FULBRIGHT & JAWORSKI, WASHINGTON, D.C.

Mr. Chairman, I appreciate your invitation to once again address this Committee on the subject of state control of water used in interstate coal slurry pipelines.[1]

In your deliberations in the last session of Congress, your Committee developed a bill and report that covered the major water law issues in the coal slurry context.[2] The bill in front of us today is in many ways similar to that earlier bill, but of course there is as yet no report to accompany it.

I note that fact, because my testimony proposes to add language to your bill. In some cases, the issues might be covered instead by language in a report. Of course coverage of a point in a statute, rather than a report, better insures that courts will follow your expressed intentions. Out of an abundance of caution, then, I am suggesting that points be covered by statute, when in some cases, report language, like that used last year, may adequately dispose of an issue.

I also propose to comment on some of the points where your bill differs from the current House Bill, H.R. 1010, on which hearings were held last week.

Recent Cases:

In the months since you last invited me to address these issues, two important judicial decisions have been handed down. You will hear a great deal about these cases today, but I wish to just touch on a few points that I believe are relevant to your work today.

In Sporhase v. Nebraska [No. 81-613, ___U.S.___, 102 S.Ct. 3456 (1982)] the United States Supreme Court laid out ground rules for testing the validity of state laws restricting or prohibiting the export of water. The Court held that water was an article of commerce, and that state restrictions were therefore judicially reviewable under the Interstate Commerce Clause of the Constitution. Of course, it was clear that water could be bought and sold, but the court relied primarily on other theories for finding impacts on commerce. The Court found a federal interest in conservation of water in a "multistate aquifer", which it saw as a "diminishing resource" important to maintenance of worldwide agricultural markets. (Slip op., p. 11.) The Court also saw ground water overdrafts as a national problem, which Congress could deal with on a national scale. (Slip op., p. 12)

The Court then examined the four conditions contained in the Nebraska statute restricting water export, in order to determine if that law imposed an impermissable burden on interstate commerce. It approved the statute's limitation of exports to cases where withdrawals were 1) reasonable, 2) not contrary to (policies of) conservation of ground water, and 3) not otherwise detrimental to the public welfare. But a fourth condition, restricting exports only to those states that gave their citizens reciprocal rights to export water to Nebraska, was held to be an impermissable and unconstitutional restriction in Nebraska law. The Court saw no valid state purpose, (such as conservation, or protection of health) that could be served by limiting exports to reciprocal states, and by prohibiting exports to all other states.

In *dicta*, the Court went on to note circumstances in which a state's reciprocity restriction might be justifiable as a conservation measure, and further noted that in some circumstances the conservation policies of an arid state might justify a prohibition of *all* water exports.

Thus, after making it clear that state restrictions on the export of water raised interstate commerce issues under the Constitution, the Court set out very general guidance for judging the validity of state export restrictions.

Of course, some of the plain implications of the decision are that 1) not all state export restrictions are necessarily invalid, (though states may need appellate court decisions to verify their validity), 2) states may, depending on the factual circumstances and legislative reasoning justifying their actions, enact new statutes restricting water export, (which will then be judged by the Sporhase standards) and 3) Congress may legislatively regulate some or all interstate water export. In the absence of federal restrictions, or nondiscriminatory restrictions in state legislation, water can be transported across state lines for use elsewhere.

The states that try to deal with the problem legislatively face several troubling uncertainties. While it is clear that an arid state can prohibit exports, must the whole state be in a water deficit for such legislation to be valid? Probably not, but where will the Supreme Court draw the line? Must the subject river basin currently have water demand equal to supply? Is it all right if the projected demand will overtake supply in five, ten, twenty or fifty years? What will be the legal impact of cheaply available alternate supplies either in the exporting or importing states generally, or in the specific localities affected? What if the only possible alternate supplies will be quite expensive? If the answers differ, how expensive must they be before export restraints will be valid? How will the tests of constitutionality of state legislation dovetail with how the Supreme Court's rules in allocating water among the states under the equitable apportionment doctrine?

I do not mention these questions raised by Sporhase to suggest that you should now deal with the general Sporhase issues, but only to suggest that it would be useful for you to define the class of state export restrictions that can be validly exercised or enacted in the coal slurry context.

The first major case to follow Sporhase, and to apply its general standards is El Paso v. Reynolds, [(Civ. No. 80-730 HB) _____F.Supp.___, D.N.M. (1983)].

The New Mexico statute had no conditions or criteria regulating export, only a flat prohibition against the transport of water to another state, a prohibition which El Paso contended was an unconstitutional restraint on interstate commerce in water. The District Court found that the New Mexico statute failed its constitutional test. In a factual setting where water apparently would have been available to El Paso if El Paso had been a New Mexico city, and where no statewide water, health, welfare or water conservation policy justified the export prohibition, the Court saw the restraint as an invalid attempt at "economic protectionism".

Of course, there was nothing in the decision that would limit Congressional legislative control of interstate water transactions.

A third case, Colorado v. New Mexico [___U.S.___, 51 LW4045 (1982)] was decided last December. It is a case of equitable apportionment by the judiciary, allocating the flow of a small river between Colorado and New Mexico. It is not directly relevant to your deliberations today, but it once again restates the principles of apportionment of flow between states, and by its timing, focuses the issue of the need to relate the Sporhase requirements to the law of equitable apportionment.

Review of Provisions of Bill

It is within that judicial context, that we must examine the provisions of this bill.

The bill opens with a statement of findings (Sec. 2) of which numbers (7), (8) and (9) express the reasoning of Congress supporting the subsequent water law provisions of the bill. By comparison, the House bill has no such findings, and I believe, is weaker for that omission. The Senate version explains that the intended priority is clearly to give State water laws primacy over a national coal distribution system.

In the report provisions accompanying this language, or by a minor amendment of the bill, you may also wish to note that the reference to interstate compacts, does not limit or alter other types of interstate water allocations, and that the state laws protected here operate only on a state's share of the flow of an interstate stream or aquifer, whether allocated by compact, by the Supreme Court or by Congress. You may also wish to note or refer to other parts of the Report or statute which define the term "State water law".

In Section 3, you may wish to consider including a definition of the term "State Water Law" since that term is heavily used in later sections. That definition could also prevent any uncertainty about your intent to include (or exclude) administrative regulations and discretionary decisions by administrative bodies within the body of "state water law" protected by the statute.

A definition would further serve to define just which state laws you wish to protect, water laws that are valid under *Sporhase*, (even though arguably subject to attack on interstate commerce grounds), state water laws enacted in response to *Sporhase*, or only those laws that are valid under the Constitution, as interpreted by *Sporhase*. Assuming that you prefer the first category, you might consider something like this.

> "State water law" shall include all that body of statutory law, judicial precedent, administrative regulation and administrative decision authorized by the State, which applies to water used in a certified pipeline. In the case of State water law restricting export of water, which law might be argued to be invalid on the ground of improper interference with or regulation of interstate commerce, such state law shall not be deemed to be invalid for that reason, insofar as such law applies to water used in a certified pipeline. State water law shall also include that new law properly enacted or created in the future.

Then in the Report, or elsewhere in the Act, you might wish to note that this Act is not intended to exempt state water laws from, or modify any requirements of, the State or Federal Constitution, except for those provisions relating to regulation of interstate commerce.

The House bill as it stands now, also fails to explicitly define the class of state water law protected or validated by its provisions.

Section 4 contains a provision [subpar. (e)(2)] which prevents the use of the eminent domain power to acquire water rights. The House bill contains a provision that is identical except that after the term "any person", it parenthetically adds "(including the Secretary, any other official or employee of the United States, or any coal pipeline carrier)". It appears to matter little whether the definition of "any person" is included in the Act or the report.

This brings us to the principal water law provisions in Section 5, PRIMACY OF STATE WATER LAW.

Subsection (a) requires that water claims, etc. for water to be used in pipelines shall be subject to State law. The House provision is largely similar. But one difference is that it eliminates the reference to the coal pipeline system in the second line. The effect of both versions seems to me to be identical.

A second difference is that the Senate version applies to "an interstate coal pipeline distribution system", while the House applies to pipelines certified under the Act. It is possible (though unlikely) that those categories could differ, that is, that there could be an uncertified interstate pipeline, and you could consider which category you intend to cover.

The third difference is that the House version omits all the language beginning with "relating to" in the last three lines. The House version appears to be more concise, and the effect of both versions appears to be similar.

My first reaction to this paragraph is to recall the hearing last year, where I pointed out that a federal statute giving primacy to State water law could be drafted and given effect, in spite of the implications of some earlier Supreme Court decisions.[3/] Past Supreme Court decisions have suggested that even though language preserving state water law is included in a federal statute, if the Congressional intent as to the relative priority of the federal project and state water law is unclear, the Courts may honor state law only insofar as it does not completely halt the federal project. [See First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946).] To avoid that possibility, the statute (as well as the Committee's Report) could express the intended priority. (See below.) When that Congressional intent has been expressed, the courts will respect it. [See New England Power Co. v. New Hampshire, ___U.S.___ (1982)].

You may also wish to consider explicitly stating in paragraph (a) that laws restricting export of water in coal slurry pipelines are covered (as well as laws on reservation, appropriation, use, etc.) or expressly state that export is a type of "use" under this statute. Since it is clear that the state export laws will be the most controversial state laws involved in future litigation, you could consider dealing with them explicitly. (See below.)

Finally if a definition of "State water law" were included in the "Definition" section, as previously noted, it could allow this section to be worded more concisely.

You might then wish to consider something along these lines.

> (a) No individual or private, state, federal or other governmental organization, may claim, acquire, use or export water, or may claim, acquire or exercise any right or other interest in water intended for use or export in a pipeline certified under this Act, unless such activity of claim, acquisition, use or export, and such right or other interest is authorized by State water law. State water law shall be enforced, and shall be superior to any claims, right or interest based exclusively in Federal law, even though that results in failure to build pipeline projects certified under this Act, and even though it results in uneven and disparate effects on interstate commerce.

Subsection (b) apparently serves several purposes, suggesting the primacy of state water law, and implicitly encouraging states to deal with Sporhase by enacting new legislation for water used in coal slurry pipelines. The House version is the same, except that they have added at the end "...notwithstanding any transportation, use or disposal of such water in intrastate commerce."

Some of the comments made above apply here. I believe the paragraph could more clearly describe the primacy of state water law, and could explicitly cover "export" laws. If the language suggested above for paragraph (a) were adopted, then there is less need to change (b). Otherwise, I suggest including some of that state primacy language in this paragraph.

Either way, I would also suggest adding the word "export" after "use," in the fourth line, and adding at the end, "notwithstanding any impact on any type of interstate commerce, or any impact on the certified pipeline project."

In subsection (c), we find a substantial difference in the House version, which in substance includes the provisions of (c)(1), but omits (c)(2) through (c)(4).

Subsection (1) specifies that state law is not to be altered and protects existing interstate compacts. The latter provision touches an issue that has been a sensitive one in discussions of coal slurry legislation - that is, a concern that a federally mandated superiority of state law should not alter the allocation of surface or ground water between states. To cover the point, I recommend addition of the following sentence to subparagraph (1).

> Nothing in this title shall alter the rights of any state to its apportioned share of the waters of any body of surface or ground waters, whether determined by past or future interstate compacts, or by past or future legislative or judicial allocations.

Subsection (c)(2) covers an issue which was mentioned in the last session, that is, possible federal pre-emption of water quality laws. This provision seems to be to be useful if it accurately reflects your intent. The House bill does not discuss the issue.

Subsection (c)(3) is an additional safeguard against an implication of a Federal water right. The language of other paragraphs presumably could cover this point, but there appears to be no reason why the point should not also be covered here. The House bill has no comparable provision.

Subsection (c)(4) protects Indian reserved rights. Since some state water laws might appear to conflict with those rights, there may be a reason for this express reassurance. But technically, state water law could operate only on a state's share of the water, and so should not operate to limit Indian Treaty or reserved rights, even if this provision were omitted. There is no comparable provision in the House bill.

Paragraph 5 (d) likewise has no counterpart in the House bill. It limits the use of water to that acquired under State law, in any interstate coal pipeline (including those not certified under the Act). I understand that one such pipeline is already in operation, but I do not know if their water rights were acquired under State law. The term "the Federal right" is ambiguous without further definition. But once that term is defined, the major question will be one of policy for the Committee, as to whether other, non-certified pipelines should be so restricted.

I would be happy to answer any questions and provide any futher information that might be useful to you.

Footnotes

1. My testimony in the last session is reported in Hearings before the Committee on Energy and Natural Resources on S. 1844, U.S. Senate, 97th Cong. 2d Sess., May 10 and June 8, 1982, Pub. No. 97-90 at pp. 1026-1044 and 1065-1069.

2. Report on Coal Distribution and Utilization Act of 1982, from Senate Committee on Energy and Natural Resources, 97th Cong., 2d Sess., Aug. 17, 1982, Report No. 97-528, Calendar No. 765.

3. Op. cit., fn. #1, Hearings, p. 1030.

Senator **Warner**. Thank you very much, Mr. Widman.

We will now hear from Charles Corker, professor of law, University of Washington.

STATEMENT OF DR. CHARLES E. CORKER, PROFESSOR OF LAW, UNIVERSITY OF WASHINGTON, SEATTLE, WASH.

Dr. **Corker**. Mr. Chairman, for the record, my name is Charles Corker. I am professor of law at the University of Washington Law School. I teach in addition to constitutional law and contracts; also water rights. I have served as contract consultant to the National Water Commission and the Public Land Law Revision Commission. I contributed to Robert Emmett Clark's treatise on waters and water rights, the chapter in volume 2 on interstate water rights. In 1965 I was assistant attorney general in the State of California with major responsibilities in Arizona against California where I actually was first introduced to this particular subject.

I am here today at the invitation of Senator Danforth through his staff last week and through the courtesy of the Southern Railroad. I understand it is only 1,500 miles long, which paid my freight through Mr. William Bonnevilia. The views I express here are entirely my own. They are identical to the views I expressed in a letter last August to Senator Baucus on the predecessor to S. 267, and I attached a copy of that letter to this statement.

I must say I agree with most of the testimony of the three preceding witnesses, including that of Frank Trelease, and I would be, if I were in any doubt at all, I would be disposed to recommend that you agree with Dean Trelease, but that is until we get down to the bottom line, and that is what is the effect, what is the actual effect and is likely to be the effect of S. 267 on the integrity and operation of western water rights?

Now I would like to read just two provisions of S. 267 and then a portion of Dean Trelease's formal statement which I saw just last week. I saw his oral testimony earlier, but I wasn't aware that his formal statement was printed or available until last week.

Section 2 which Mr. Widman has just referred to contains nine findings. "The Congress hereby finds and declares that," and then there is five findings that deal with energy and pipeline problems, and the sixth declaration is that, "The construction of interstate coal pipeline distribution systems is a beneficial use that justifies granting the Federal power of eminent domain to those systems for which a finding of national interest has been made pursuant to this act."

That I think is a reassuring statement to everybody of my persuasion, Dean Trelease's persuasion, and I think Ed Clyde until at least fairly recently.

Return to the next to, the next to the last section—excuse me—the penultimate section, section 7, which is captioned:

> An Application of State and Local Law: Nothing in this act shall alter or in any way preempt the applicability of any State or local law, regulation or rule of law pertaining to the location, construction, operation or maintenance of an interstate coal pipeline distribution system.

Now that is about as broad as you could like, unless you wanted to say, and we really mean it, cross our hearts and hope to die.

That isn't what follows. What follows is the word "except," ". . . except where such applicability would have the effect of prohibiting the location, construction, operation or maintenance of the interstate coal distribution system."

With that "except" there may be some things left out for State law to do definitively like what color the pipeline shall be painted or how it shall be decorated, but a bill which says that, and I think the thrust of this bill has to be that coal slurry pipelines are a beneficial use and are there in the public interest, Federal public interest, the final language comes very close to saying that State law shall not be permitted to prevail where it involves the location, construction, operation or maintenace of the interstate coal pipeline distribution system.

Now even if I am wrong about that, I think the enactment of this bill would be understood as an invitation to go ahead with ETSI's money and other investors' money invested in coal pipeline distribution systems. They would go into operation, and whatever this bill says, I think there is the strongest reason to doubt that either the Supreme Court of the United States or the Congress of the United States, after a vested right in what has been a vested right in every sense, an operating, going concern system, would ever be discontinued. I notice that this used to have, this bill used to have a provision in relation to discontinuing the system after it started. Every sophisticated State law system has to have some source of power, Federal or State, for the administration of the water right, for reallocating water.

I would hope all these with just compensation which the fifth amendment requires for the taking of private property—but these pipelines are beyond States' reallocation power. They are beyond the power of administration of the State engineers.

My objections, and I might say they are shared by my colleague, Professor Johnson at the University of Washington who submitted testimony which was included in the record last year, and a number of other law professors—Jim Crawbridge I think of the University of Colorado submitted testimony—my objections are about three in number, and I will state them very simply, summarizing it.

First, as Dean Trelease accurately said, Elwood Mead is the father of the system of State water law which every State where water is scarce follows in greater or lesser faithfulness and the essence of Elwood Mead's contribution to water law—this isn't State water law or Federal water law particularly; it is water law—is that it must be the function of qualified State engineers, hydrologist, with an adequate staff, to determine before that piece of paper called a license or permit is given to appropriate water, whether that water is available for appropriation, which means water will probably be available to satisfy existing rights and the new right which is being established.

This bill authorizes it is not just the ETSI pipeline which may be only 3 percent now of some unstated figure, but makes an authorization for a Cabinet member, without any guidelines, to make a determination of whether it is in the public interest—as broad as that—to authorize a quantity of water to be taken from an uncertain quantity now available, not already committed to use.

How uncertain that quantity is should be understood in the light of the great hydrologic fact that throughout the United States ground water aquifers are being rapidly reduced to the point where the pump will not pump anymore, but they are also in that process of reduction draining the water from the surface streams. There is an overcommitment of the total supply. Surface and ground water, which is all part of a hydrologic cycle, there is no responsibility in this bill to determine how much water there is in any one.

Who has the capacity to do that? The State engineers can do it for their individual States. There is no interstate Federal engineer created with any responsibility. The enactment of this bill I think in those circumstances would be basically irresponsible.

Second, it refers to State law; 267 treats State law as if it were what Justice Holmes called the "brooding omnipresence in the sky." When we get right down to concrete particulars, and Dean Trelease confirmed this in the testimony that I just referred to last year, when a choice has to be made, it is the choice made by the upstream State where the water is diverted. If water is diverted from State A and is detoured around downstream States B, C, and D, and it doesn't matter whether we are talking about surface streams or water from underground reservoirs, this is inevitably the division under the authority of Congress—one State to divert what is the common good, the common water supply, available to all of the States which have natural access to that aquifer or that stream.

I have suggested that this bill might be captioned after that great man of finance, Jay Cooke of the 19th century, who nevertheless stated a great and enduring moral principle where he said, "He who sells what isn' hisn' must buy it back or go to prison," and this is permitting State A for cash consideration—I won't embarrass the Senator or implicate the guilty by identifying State A—State A proposes to sell for cash consideration, kept entirely by itself, a portion because it is only so little and I think we heard one third of 1 percent which is probably as accurate as any figure that could be arrived at now. That should be impounded in constructive trust for States B, C, and D down the stream. One of those I guess is Senator Danforth's State, but I will not repeat the name of that State.

The CHAIRMAN [Senator McClure presiding]. Are you in a position where you can summarize?

Dr. CORKER. I would like to state the final and I think the major difficulty, and that is the one addressed by Dean Trelease last year, and in many respects this bill has been improved as a result of his suggestions, but the difficulty, the element, and the final difficulty is that this bill attempts to reconcile what cannot be reconciled, the immovable object and the irresistible force.

It is probable that any bill for this purpose, and the purpose is to advance coal slurry pipelines, would be read like the Boulder Canyon project Act of 1928 was read. Yes, we will authorize the dam. We will exalt State law. There were two sections in the Boulder Canyon project authorizing Hoover Dam that did so, but inevitably the result after the project is built is to take the purpose which is loud and clear, and that is the purpose which is loud and clear, and there is no way that I would be able to identify at the present time, with as little as we know about the ultimate results of the *Sporhase* case, to do what this bill does in purporting to protect State law. Again, I think this aspect is summarized. In other words, this is the bill which says, "Mother, may I go out to swim?" "Yes, my darling daughter. Hang your clothes on a hickory limb but don't go near the water."

If you can figure out how to establish a water right in State A which accommodates the clause of State B, C, and D downstream without in any way quantifying those by compacts, by adjudication, I think you better hire Frank Trelease and put him on that job, but that is a challenging job. That qualification has to be done I think by compact, by agreement of the States.

This bill defeats the possibility of arriving at compacts because it provides an incentive for States which are upstream to do what Del Carpenter of Colorado did when he was the great water lawyer upstream in the Colorado River Basin—to say we don't have to have a compact because what we now have, we are upstream, what we now have is ours, and now unlike the situation in his time, Congress would definitively endorse that position.

Legislative history shows that this bill, whatever happens, is in light of a squabble, a lawsuit, a background in which downstream States are suing upstream States, all of whom claim rightly an equitable apportionment of a joint interstate resource. The Congress endorses that without providing even the basic machinery for resolving that very disastrous conflict which would be set in motion.

You may perceive I feel rather deeply about this. I do, because I was brought up on a Federal reclamation project under Arock Dam in Boise, and the annual business of watching Arock Dam go dry and crops burn out until Anderson Dam was built was a very, very traumatic and painful experience, and those will be duplicated unless it is realized that the entire hydrologic system, surface and ground water, is part of one resources that is being very rapidly exhausted, and that the consequences of that exhaustion are irreversible.

[The prepared statement of Dr. Corker follows:]

PREPARED STATEMENT OF DR. CHARLES E. CORKER, PROFESSOR OF LAW, UNIVERSITY OF WASHINGTON, SEATTLE, WASH.

My name is Charles Corker. I am a Professor of Law at the University of Washington School of Law in Seattle. In addition to Water Law, I teach Constitutional Law and Contracts. I served as a contract consultant to the National Water Commission and to the Public Land Law Review Commission. I am a contributor to Volume II of Professor Robert E. Clark's Waters and Water Rights. My chapter deals with interstate water rights. Prior to 1965, I was an Assistant Attorney General of California with a major responsibility in the Arizona v. California, Colorado River litigation which culminated in an opinion in 1963 (373 U.S. 546) and a decree in 1964 (376 U.S. 340).

I am here today as a result of an inquiry by Senator Danforth through his staff last week, and the later offer of expenses for my time by counsel for the Kansas City Southern Railway Company. However, I represent no client. The views which I express are my own. They are identical to the views I expressed last August in a letter to Senator Baucus on the predecessor to S. 267, then identified as S. 1844, in the 97th Congress. A copy of that letter is attached to this statement.

I shall here elaborate the major reasons for the earlier objections. The objections are three in number. The first objection is that S. 267 permits the commitment of water from some of the most arid states of the nation to new uses in uncertain quantities. It does this without any effort to determine how much, if any, unappropriated water is available for appropriation. That is a dangerous commitment.

Western water law doctrine of prior appropriation begins in the mining camps of California. A miner or a farmer could appropriate by diversion as much water as he could beneficially use. When a stream goes dry, the most recently initiated appropriation gets no water. Nature alone determines if water would be available to appropriate.

Elwood Mead, as Territorial Engineer of Wyoming, replaced that system with one designed to safeguard water supply and water users against over-appropriation. The Territorial Engineer or State Engineer now inventories the water supply, and determines the quantities of water necessary to supply existing rights before he grants a permit to a new appropriator. He determines if water is available for the new appropriation. Every western state follows that pattern, with varying degrees of faithfulness.

Elwood Mead made it possible to avoid over-committing water supply. His administrative system does not always succeed, because water supply must be determined by using past rainfall and runoff records. Both the data used and the accuracy of their reporting vary greatly. Most errors have been on the side of over-optimism--too large estimates of water supply, too small estimates of future water demand. As a result, the history of the west is a history of federal rescue projects, highly subsidized by the nation's taxpayers because the beneficiaries of the projects are in desperate condition and cannot pay. There has never been a federal interstate engineer with interstate duties to determine project water supply for interstate water projects. The nearest approximation to a federal interstate engineer is the Secretary of the Interior, but he exercises no responsibility like that exercised by Elwood Mead, his counterpart in the states. This bill gives the Secretary no such authority or responsibility. Yet it authorizes the Secretary to commit water rights, independent of any determination of whether or how much interstate water is available.

Most of the errors in project planning have been egregiously over-optimistic. The results have been progressively more and more catastrophic. The Colorado River is an example. In 1922, seven states wrote the first interstate river compact in history and allocated between the upper and lower Colorado River basins what they thought would be not more than 80 percent of the supply. The balance would be subject to a new compact after 40 years. As late as 1952, when the last Colorado River suit began, an important issue was whether existing legal rights would attach to "surplus water" subject to the future compact. Today we know--Congress formally recognized this fact when it enacted the Colorado River Project Pact in 1968--that there will be no surplus water above the quantities allocated in 1922. The Central Arizona Project is now being constructed to alleviate the desperate condition from overdrawn groundwater, but most of the Central Arizona Project's water will be only temporarily available until it can be used by Wyoming, Colorado, Utah, and New Mexico.

The second objection is that the water now proposed to be committed to coal slurry pipelines is an interstate resource now available to a great many states. The only major exceptions to this consist of closed basins in Utah and Nevada, where the water drains into the interior of the state and evaporates.

The protection afforded by the present bill to interstate water supplies is the requirement that the state of diversion must approve acquisition of the right under its own laws. This approval is that of only one of two or more states. The one state, if it is the upstream state or shares an aquifer, will be protected. The slurry pipeline which diverts water in State A and by-passes that water around States B, C, and D cannot do so under the law of State A. State A has no law which permits it to deprive States B, C, and D of the water which they all share as states which have natural access to the supply.

I would label S. 267 the Jay Cooke Act after that Captain of Finance who authored this great truism:

> "he who sells what isn' hisn'
> must buy it back or go to prison."

I do not suggest that an American state can be sent to prison for selling its downstream neighbor's water. I do say that it is wrong to give any state an invitation to commit that crime for a paltry few dollars.

Congress may have constitutional power to do this, but I hope and believe that Congress will have the wisdom not to try to find out. The phrase "state laws" in the bill provides no protection at all. The phrase does not protect. It is likely to dangerously mislead all those who rely on an illusion of protection.

That is the third objection. I do not doubt the good faith of the sponsors of the protective amendments. They are, however, illusory.

Section 2 contains a finding which, standing by itself, is quite accurate:

> "The Congress hereby finds and declares that. . . (9) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law and interstate compacts on the allocation of water."

That finding is thoroughly correct even though it is subordinated to ninth and last position. There are many ways to get energy, of which burning coal provides one. There are many ways to deliver coal, of which a coal slurry pipeline is only one, and only a recently discovered one. Without any slurry pipelines, there are ways to distribute coal to every part of the nation without using quantities of water from the most arid regions of the country.

By contrast, water use ranges from a convenience to an absolute necessity. We cannot survive--we cannot produce food and fiber--without water. Water has no substitute. The difficulty with S. 267 is that it contradicts itself. If the bill means anything at all, it means something different from what the finding just quoted says, and it says so in an obscure and highly misleading fashion.

Section 5 is headed "PRIMACY OF STATE WATER LAW." Section 5(d), for example, says,

> "No waters to which the Federal right can be asserted shall be used in any interstate coal pipeline distribution system, unless authorized pursuant to and subject to State law, the same as other water rights acquired under subsection (a)."

State law "has primacy", but the state law is the law of which among 50 states? Two answers are possible but neither is workable. The first possibility is a reference to the law of the state of the water's diversion or to the law of the state of the water's uses. It cannot be in reference to the laws of two states which are inconsistent or which are inconsistently administered.

Moreover, nearly every western state requires a water right to be "appurtenant to the land irrigated." Section 8 of the Reclamation Act of 1902 makes those words applicable to every federal reclamation project. However, this cannot be enforced by a State Engineer without aid of a compact or a federal statute. The State Engineer of every state must prevent the waste of water. But the law of State A cannot give him power to perform that task in State B. S. 267 does not purport to enlarge the State Engineer's power.

The second possibility is that "state law" means the common principles of state law--a kind of general average state law. This possibility will not withstand a hard look. It got a hard look in Arizona v. California. Sections 14 and 18 of the Boulder Canyon Project Act were supposed to protect state law. But Congress failed to explain in that act how state law could possibly deal with water rights served by Lake Mead, impounded by Hoover Dam.

Hoover Dam and Lake Mead lie on both sides of the Arizona-Nevada boundary. Arizona prohibited the dam. Nevada law favored it. Arizona sued the Secretary of the Interior and the other six Colorado River states to enjoin construction of the dam. Justice Brandeis wrote the opinion of the Court holding that the purpose of the Boulder Canyon Project Act, to further navigation, adequately supported the power of Congress to regulate interstate commerce by means of the authorized dam. Arizona v. California, 283 U.S. 423 (1931).

In the 1963 Colorado River case, the Court said that the water delivery contracts authorized by Congress are the basis of water rights below Hoover Dam in California, Arizona, and Nevada. That was the only likely alternative.

Indeed, the current bill expressly says as much. Section 7 would protect states against preemption of their laws but with an exception. State laws cannot "have the effect of prohibiting the location, construction, operation, or maintenance of the interstate coal pipeline distribution system."

One does not often find jokes in federal statutes, but this has to be a joke. If state law may not prohibit "location, construction, operation, or maintenance of the interstate coal pipeline distribution system", what can state law be allowed to do?

The only answer is a childhood verse:

> "Mother, may I go out to swim?
> Yes, my darling daughter;
> Hang your clothes on a hickory limb,
> And don't go near the water."

If the proposed law leaves any function to state law, that function is too insignificant to be worth preserving. Indeed, the features to protect the "primacy of state law" actually do more harm than good. They relieve the Congress of responsibility for its action by appearing somehow to defer to state law and interstate compacts. Such reassurance is misleading.

Finally, the bill cripples both of the two existing methods for allocating interstate water. One method is the interstate compact, which is the method most frequently used. The other is the interstate suit in federal or state courts for an equitable apportionment of the interstate resource. Both methods work in tandem because only the possibility of an interstate suit stimulates efforts to reach agreement by compact. The Colorado River Compact was successfully negotiated in 1922 only because, earlier in the same year, the first interstate decree for equitable apportionment of an American river was entered into between Wyoming and Colorado. Senators and governors from Colorado, Wyoming, New Mexico and Utah were pursuaded that a compact was necessary and put a ceiling on lower basin appropriations that Hoover Dam would make possible. The Colorado River compact was a condition of Congress' authorization of Hoover Dam.

There are many ways in which Congress can assist the states in dealing with interstate waters. Congress may be called on to deal with the problem which may arise as a result of the Supreme Court's _Sporhase_ decision last July. I understand, in fact, that a principal aim of Section 5 of S. 267 is to do just that. In _Sporhase_, the Court held one provision of a Nebraska statute requiring a permit to export groundwater unconstitutional. _Sporhase_ was remanded to Nebraska courts for a decision on whether that provision--forbidding exports of groundwater to a state whose law denies reciprocity--was severable. In the last few weeks it has been held to be severable. I do not believe that Nebraska will fail under the Constitutional clauses of the statute to prevent the Sporhases' Nebraska well from serving water to their Colorado land. Mine is a view expressed by Justice Rehnquist in his dissent. If I am right about that, any necessary revisons of the laws of states other than Nebraska are likely to be unnecessary or modest. If I am wrong, Congress may be called on to permit states to administer their interstate water resources in the interests of conservation.

Clearly S. 267 does not effectively address the possible Sporhase problem. If Section 5 of S. 267 intends to remit to the states the powers they assumed they had prior to the Sporhase case, it fails to do so with sufficient specificity to assure that the courts will in fact protect state water export laws. The term "State law" in Section 5 is far too vague to mandate that federal courts applying federal Commerce Clause powers respect state water export laws. Overturning a Constitutional Commerce Clause power is not a simple statutory task. I urge the Committee to give much more careful consideration to this task than the language in S. 267 now shows. There is also a basic question about the legal wisdom of attempting to narrow a Commerce Clause power in the context of a bill providing a major expansion of that power. As I suggested above, that effort may be fundamentally contradictory.

Before acting on legislation, we need to learn more about how the Sporhase case will turn out, both in Nebraska and Colorado and under the laws in operation in other states. The worst Sporhase possibility is that no effective restraints may be imposed on the acquisition of new water rights for export.

That would leave interstate groundwater rights threatened by a new rule which awards the water to the well owner with the deepest well or the most powerful pump. In such case, Congress will need to address the problem, but it is not wisely addressed at this time in this bill.

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School of Law
Condon Hall

August 27, 1982

The Honorable Max Baucus, U.S.S.
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

You ask for my views on S 1844, a bill to grant the power of federal eminent domain to coal slurry pipeline enterprises approved of by the Secretary of Energy or his successor. I have read the bill in its form reported on August 17, 1982, and the accompanying report. I am happy to give you my views. They are in agreement with your conclusion that

> "this bill could pose a serious threat to the ability of the western states to manage and allocate their water and land resources."

First it embodies express declarations and findings of Congress that the public interest necessitate coal slurry pipelines. It is an invitation to the Supreme Court and to other courts to pick up where Sporhase v. Nebraska leaves off. Sporhase purported to invoke negative implications of the commerce clause operative when Congress has been silent. The case leaves most state laws, I think, alive and well if the State makes a stronger showing of necessity than Nebraska did. But S. 1844, if enacted, supplants congressional silence with a cymbal crashing endorsement of coal slurry pipelines.

Second, S. 1844 expressly bars states from choice in the use of their water resources where the slurry industry and the Secretary of Energy decide that water should be used to slurry coal. A state may not, according to section 7, prohibit "the location, construction, or maintenance of the interstate pipeline distributing system."

I have given thought to whether useful amendment of the state protective features is possible. I think the answer is probably no, consistent with the obvious purpose of the bill. That purpose is to remove obstacles to coal slurry pipelines. That purpose, and the purpose to preserve "the primacy of State water law and interstate compacts on the allocation of water" (§ 2(a)(9)) are simply mutually inconsistent.

The easiest point to demonstrate this mutual inconsistency is in the two parts of the single sentence which makes up § 7. The first part, recites the intent not to alter or preempt state law -- but without any statement about what Congress thinks the effect of state law is. The second part -- which I underscore -- states the overriding federal purpose, regardless of what the first part may have said:

> "Nothing in this Act shall alter or in any way preempt the applicability of any State or local law, regulation, or rule of law pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such applicability would have the effect of prohibiting the location, operation, or maintenance of the coal pipeline distribution system.

If the state may not prohibit "the location, operation, or maintenance" of the coal pipeline system what can a state do? I would suppose that a state could still direct that the pipeline be painted red, white, and blue, that it be stencilled with the state's motto in Latin or English, or the state can provide for erection of tasteful screens to hide the pipeline from public view. And on flag day the Governor might stand on the pipe to address his people on the federally recognized virtue of "primacy of state law." But it is clear that "primacy" does not extend to deciding the pipeline's location, or interfering with its operation and maintenance.

Section 7 could be amended to give the State a power to refuse to permit within its boundaries the diversion of water to slurry coal, the use within its boundaries of water to slurry coal, or the delivery within its borders of slurried coal or water. That would be contrary to the whole purpose of S. 1844. I suspect that if so amended the bill's sponsors would quickly lose interest.

I have no doubt, Senator, that S. 1844 is a good faith attempt to reconcile the irreconcilable, and that there are those who think that purpose has been achieved. The fallacy seems to me to be revealed in § 2(a)(7):

> "State water law and interstate compacts are carefully balanced and structured systems for the allocation of water; . . . ."

Apparently the sponsors overlooked a third important element -- the law of equitable apportionment. This is "federal interstate common law" fashioned both by the Supreme Court and by lower federal courts to deal with rights satisfied by interstate streams and aquifers. Hinderlider v. La Plata and Cherry Creek Ditch Co. 304 U.S. 92 (1938). This law of apportionment is important in its own right. It is even more important because judicial enforcement of equitable apportionment is the motivating force in the negotiation of interstate water compacts.

> "Bound hand and foot by the prohibitions of the Constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of Congress. A resort to the judicial power is the only means left for adjusting or persuading a state which has possession of disputed territory to enter into an agreement or compact relating to a controversed boundary. Few, if any, will be made when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probably that controversies will be settled by compact." *Kansas v. Colorado*, 185 U.S. 125, 144-45 (1902), quoting *Rhode Island v. Massachusets*, 37 U.S. (12 Pet.) 657, 726 (1838).

The primary reason I would insist on the recognition of the interstate law of "equitable apportionment" is to save state law from being strangled by the over-enthusiastic embrace of those who would by oversight or design give "state law" a function it cannot well perform.

Suppose that a particular water resource is shared in a state of nature by states *A*,*B*,*C*, and *D*. That is, all of the four states have physical access to the water. An adoption of "state law" is ambiguous, even though by coincidence the internal law might be identical within all four states. No state should be permitted power to dispose of more than its own equitable share of the interstate water resource. *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, *supra*. But until compact or adjudication, there is no basis to ascertain each state's "equitable share."

I would suppose that any water which State *A* puts beyond the reach of states *B*, *C*, and *D* by committing to a coal pipeline should be deducted from *A*'s equitable share determined in future interstate adjudication among states *A*, *B*, *C*, and *D*. Particularly, this should be true if state *A*, has received payment or other *quid pro quo* from the pipeline, and states *B*, *C*, and *D* have objected. However, for Congress to invite states in the position of state *A* to permit the export of water in which States *A*, *B*, *C*, and *D* all share an interest is irresponsible at least until Congress recognizes the problem and supplies a solution. The shortcoming of S. 1844 is that it overlooks or obfuscates the problem.

Thus, Section 5(a) says that "The United States or its agents, permittees, licensees . . . shall not reserve, appropriate, purchase, transfer, use, divert, dedicate or claim water within any State for an interstate coal pipeline . . . . unless such reservation, appropriation . . . takes place pursuant to and in compliance with substantive and procedural law of that State relating to the control . . . of water rights."

This says, I think, that state *A* is competent to permit a pipeline to appropriate and divert interstate water in state *A* for a pipeline which will carry it away from downstream states *B*, *C*. and *D*.

Delph Carpenter of Colorado, "father of the Colorado River Compact," would have asserted this to be within a state's rightful power under the law of nature and nature's God. But it is not the law since Kansas v. Colorado, and should not be the law in a federal union.

I am currently at work on a paper on the effect and implications of Sporhase. They are not at all clear in many respects. The response of the states, I think, should be to seek a statute which will make possible more or less informal interstate agreements to deal with small aquifers, and other sources of interstate water too numerous, too diverse in site-specific problems to attract the attention of Congress. My paper will not see publication for at least several months. However, it is clearly the course of wisdom for Congress to withhold action on S. 1844 until there had been opportunity to assess the effect of Sporhase and its impact on water resources — particularly those fragile resources of all — groundwater aquifers and their stored water contents.

Read most broadly, as I think it need not be, Sporhase puts the states effectively out of the business of administering their water resources — most of which are shared with one or more states — until Congress can act. And Congress cannot act in a sensitive and optimum way, except maybe to undo the Sporhase decision. At this point, that would be neither politically feasible nor wise.

Sincerely,

Charles E. Corker

Charles E. Corker
Professor of Law

The CHAIRMAN. Professor Corker, thank you very much. I would be very happy to have you sit as a judge on a case.

Dr. CORKER. I will get Dean Trelease to argue because he has to tell me what to do about it.

The CHAIRMAN. We will next hear from Professor Claflin from the University of Wisconsin.

STATEMENT OF DR. THOMAS O. CLAFLIN, PROFESSOR OF BIOLOGY, UNIVERSITY OF WISCONSIN, LA CROSSE, WIS.

Dr. CLAFLIN. Thank you, Mr. Chairman, Committee members. I am from Wisconsin. I am employed by the University of Wisconsin where I direct the activities of the river studies center, and that is a position which I have held for 12 years, and I will keep my comments brief today, but I am here to address what I think are really some very serious and important questions concerning the environmental aspects of the coal slurry transportation, particularly the implications on surface and ground water, and I think the impacts are fairly easy to categorize.

Certainly there are impacts associated with construction. We know that. Since there is excavation involved, there will be obviously detrimental impacts, particularly in areas where the lands are being valuable for other purposes such as farm lands or natural prairies or whatever the case might be.

The proposed ETSI pipeline, for example, apparently is going to disrupt approximately 23,000 acres of land in one fashion or another, so those are perhaps the most visible kinds of impacts, but I guess I would submit to you that there are others that are less tangible, and somewhat very tangible ones as well particularly having to do with water.

If there is one thing we do know about river ecosystems, it is that the stability of river systems from a biological point of view is sustained by similar stability in the discharge of water in that system, and sustained abnormal reductions in normal flows certainly have adverse impacts on reservoir dynamics and have been shown to result in the dewatering of floodplains in open, unimpounded reaches of river.

These changes are physical, but they are also reflected in the biological community as well. I think another problem that really needs to be scrutinized has to do with the differences in the water characteristics between basins. When we deal with interbasin water transfers, very seemingly sometimes minor differences in water quality or water characteristics become important insofar as the transfer process is very cumulative.

For example, the movement of Missouri River water to the Arkansas River or a tributary of the Arkansas River in Oklahoma at least may well violate the Oklahoma State effluent standard at least for water, and I would submit it might even violate those standards even if it weren't used for coal slurry processes.

On a larger scale, though, I think the entire question of water availability really has yet to be addressed. Pipelines certainly are expected to operate for periods of time from perhaps 20 to 30 years, and I think this makes the water availability at least expressed as average flows per year relevant because droughts and associated low flows are really historic facts. This is particularly true in the West. In the Missouri River, for example, the adequacy of water is essential to maintain channel depth downstream for navigation. The Corps of Engineers projects that the projected uses of water from the Missouri River for irrigation projects and other purposes will probably deplete river flows in a manner that can seriously disrupt navigation downstream, and in fact in 20 to 30 years the Missouri River may not be navigable unless it is drastically modified.

For most of the western rivers then the differences between average flows and low flows are very significant. The perennial requirement for slurry water and the very consumptive nature of its use then really has a clear potential for impact particularly upon alternate uses of water.

Perhaps a third category of impacts would be associated with the problems at the other end of the pump, the dewatering process. We know that the quality of effluent water is largely a function of the type of coal that is being used, and is certainly a function of the characteristics of the intake water, but it has been shown by virtually every investigator that has worked on it that leachates do partition from the coal into the water at various concentrations and various levels.

At the other end when the coal is dewatered, the process certainly removes the bulk of the coal, but the water fraction is left with both insoluble and soluble components. The suspended components include very small, very fine coal particles, and in fact one of the major concerns of the coal slurry operations industry involves the generation of very fine coal particles and particulates through the transportation process.

EPRI, the Electric Power Resources Institute, reports that coal fines are unavoidable products of the coal grinding process, and their use is really a matter of great concern. In fact, they are considered to be chronic pollutants in the industry itself, and attempts to dewater them have largely been unsuccessful today.

There is a fraction of leachate as well that includes organics, heavy metals, sulfur, and again concentrations being largely a function of the type of coal that is being slurried. I think the literature essentially would have, the scientific literature would have the reader believe that, or at least some of the authors would have the reader believe that leaching of toxic heavy metals from the coal occurs only at low levels, and I think there is justifiable doubt regarding the methodologies employed at least in some of these studies, and certainly some doubts concerning the prediction limits of some of the instruments that were used.

In addition to metals, there are organic compounds, particularly polynuclear aromatic compounds, which are quite prevalent in western coal. They are slightly soluble, but there is every indication that at least a fraction of them will become solubilized particularly under aerobic conditions where they exist, and in fact will reside in the leachate water, the separated water.

There is finally a group of compounds of one sort or another that are added to the coal slurry as an anticorrosive device. Hexavalent chromium, for example, is used, and phosphorous-containing compounds are commonly used both certainly in water quality problems at the downstream end, so what I am saying I guess is that with regard to water quality at the dewatering end, there are a myriad of problems. There will clearly be some difficulties in meeting State water quality standards in many instances.

In a recent report prepared by the Los Alamos National Laboratory the authors described and confirmed the potentially serious risk associated with the release of discharge from coal-slurry waste ponds, and this brings up the final category of impacts that I might mention to you, and that is the category of breakages and spills and other operating contingencies.

There are two things that can happen essentially to a pipeline to disrupt its normal operation. It can go down because of a pump or it can plug or the pipe can break, and these kinds of events of pipeline failures aren't uncommon. In 1974, for example, in this country, there were in excess of 1,200 pipeline events of one sort or another where the gas and petroleum pipelines—I understand there is a lot of pipe there, but just to point out to you that pipeline events such as breaking and leaking and plugging really are and have to be a planned-for contingency.

A break in a coal-slurry pipeline may not be as serious as a break in a gas pipeline in terms of explosive damage, but the leakage of coal slurry in the environment certainly will constitute and can constitute a hazard to the environment were it to occur in a stream basin or hazardous to human health were it to occur in a populated area. Spilled coal slurry or coal slurry that is pumped into holding ponds from where the pipe goes down, has very little value unless there are ready buyers available with the ability to use finely divided coal and so the material needs to or must be simply dredged out and hauled away, but the remnants of slurry coal in waste ponds along the course of the pipeline does in fact constitute, I think, very serious potential for environmental damage, so in summary, the ecological picture I think that has been painted by the proponents of slurry transportation is not quite as problem free as one would be led to believe.

Serious problems exist at both ends and along I think the entire reach of the product line. I think before we propose to dedicate and degrade billions of gallons of water each year in a really tight water economy, that we should consider our acts and perhaps more importantly address the questions prior to construction rather than after because I really don't think we can afford to make the same mistakes that we have made with our river systems in the past. Reclamation is always more costly than good planning.

[The prepared statement of Dr. Claflin follows:]

PREPARED STATEMENT OF DR. THOMAS O. CLAFLIN, PROFESSOR OF BIOLOGY, UNIVERSITY OF WISCONSIN, LA CROSSE, WIS.

My name is Thomas O. Claflin. I reside in LaCrosse, Wisconsin. I am a director of the River Studies Center, located at the University of Wisconsin at LaCrosse. The Center has been involved in numerous research projects during the past 12 years, dealing with several aspects of stream, river and reservoir ecology. More specifically, I and my colleagues have undertaken research dealing with the dynamics of large river systems (Mississippi River, Missouri River, Nelson River in Manitoba and the Wisconsin River) and many smaller rivers in several geographic areas of the United States. Although the activities of the River Studies Center have dealt with many aspects of aquatic science including the quality of surface waters, our experience is probably most extensive in reservoir ecology.

I am here today to address what I believe are serious and important questions concerning coal slurry transportation and its implications for surface and ground water. There is no question that the movement of slurried coal involves the movement of large quantities of water. The impacts associated with slurry and water transfers are fairly easy to categorize.

1. Impacts Associated with Construction of the Pipeline.

Proposals are currently being considered to construct pipelines through great distances in the West and Midwest. One particular pipeline (ETSI) with its necessary easements would bisect vast areas of natural prairies and productive farmlands, in addition to crossing a large number of streams and rivers. It is estimated that construction of the ETSI pipeline will disrupt nearly 23,000 acres of land. There certainly is no question that impacts due to construction will occur in these areas since excavation will be necessary. These impacts could be long lasting and severe and are inherent in virtually all pipelines.

2. Water Withdrawals.

Whether water is withdrawn from underground aquifers or from rivers, there is a potential for adverse environmental impacts to occur. Depletion of groundwater and the subsequent dewatering of neighboring wells has occurred in the past, particularly in semi-arid regions of this country. Concern about this fact has been expressed by geologists, hydrologists, and indeed the people that depend on ground water for their water supplies. The withdrawal and inter-basin transfers of surface water also pose serious threats to the river ecosystems in question. It is a fact that the stability of river ecosystems is sustained by similar stability in the discharge of water. Sustained reductions in normal flows can adversely affect reservoir dynamics and can result in the dewatering of the floodplain in open, unimpounded reaches of river. In addition to the physical changes that could occur, the diversions of water and the loss of discharge would be reflected in the existing biological communities. These are impacts which must be identified prior to the water withdrawals taking place. However, little or no research has been conducted to date on these important issues.

Natural differences in water characteristics are important when considering inter-basin water transfers. Seemingly small differences in water quality variables often become significant when inter-basin transfers occur. For example, the movement of Missouri River water from South Dakota to the Arkansas River in Oklahoma will clearly violate the Oklahoma state effluent standards for water hardness. This could conceivably restrict the use of the receiving waters (Arkansas) for irrigation,for which it is presently used.

On a larger scale, the entire question of water availability has yet to be addressed. If pipelines are expected to operate for periods up to 20-30 years, the water supplies expressed as average flow is irrelevant. Drought and associated low flows are historical facts. This is particularly true in the West. In the Missouri River, for example, the adequacy of water is essential to maintain channel depth for navigation. Projected uses of this water for irrigation projects and other purposes will deplete river flows in a manner that could seriously disrupt the future navigability of the River.

For most of the western rivers, the differences between average flow and low flow are significant. The perennial requirement for slurry water and the consumptive nature of its use therefore has the clear potential of impact upon alternate uses and certainly upon the riverine ecosystems. It has been asserted by coal slurry proponents that projected use of water for one or two pipelines, when compared to national or basin-wide discharge totals, appears to be negligible. While not agreeing with this assertion in the absence of appropriate data, it is clear that, compared to total flows of streams and rivers in the vicinity of the mining operations, however, the withdrawals are inordinately large.

3. Impacts Associated with Dewatering And the Discharge of Slurry Water.

The quality of the effluent water for coal slurry operation is largely a function of the type of coal used and the characteristics of the intake water. The partitioning of leachates from coal into the water is also partially controlled by the conditions that exist within the pipeline transfer process.

Although the dewatering process removes the bulk of the coal, the water fraction is left with both soluble and suspended derivatives from the coal. The suspended materials would include very small coal particles. One of the major environmental concerns of coal slurry operations invoves the generation of very fine coal particles through the slurrying and transportation process. The Electric Power Resources Institute (EPRI) reports that coal fines (less than 40 micrometers in diameter) are an unavoidable product of the coal grinding process and that the use of these is a matter of great concern. In fact, such coal fines - or small particles - are considered to be chronic pollutants. Attempts to dewater them have largely been unsuccessful.

The dissolved fraction of leachate includes heavy metals, sulfur and in general the components that comprise total dissolved solids. Although several reports in the literature would have the reader believe that the leaching of toxic heavy metals from the coal occurs only at low levels, there is justifiable doubt regarding the methodology employed and the detection limits of the instuments that were used to measure the metals in question in several of the studies. Solubilities of organic compounds in coal also vary considerably. Polynuclear aromatic compounds that comprise the bituminous coal structure are prevalent in western coal. Although these compounds are only slightly soluble, it is probable that at least a percentage of them will be oxidized into water-soluble organic acids when they are exposed to aerobic conditions. Further, the problems created by long entrapment of coal particles in an atmosphere lacking oxygen (i.e., the pipeline) may be even more severe. As mentioned, the leaching of heavy toxic metals comprises one potentially severe problem. In addition, the use of phosphorus compounds to inhibit pipeline corrosion may well increase phosphates in the wastewater, leading to problems in the cooling mechanisms of the generationg plants if the water is used for cooling. (Teknekron, 1982).

Finally, the treatment of the slurry/coal mixture with corrosion inhibitors also poses a threat to the quality of the effluent water. Hexavalent chromium is most commonly utilized and is known to be harmful to water quality for fish, wildlife and human uses. Furthermore, it is suspected that chlorination of slurry water has the potential of generating chlorinated hydrocarbons, several of which are likely precursors of known carcinogens. In short, there are very few reliable data available to describe these complex problems of coal slurry dewatering.

In a recent report prepared by the Los Alamos National Laboratory, the authors confirmed the potentially serious risks associated with the release of discharges from coal slurry waste ponds. The abstract of the report, for example, states:

> Slurry waste ponds associated with seven coal preparation plants, along with the slurry effluents from these plants, have been examined in order to assess their water quality impacts. These studies reveal that the drainages from slurry ponds associated with plants processing high-sulfur coals may pose significant environmental problems because of high acidities and high concentrations of iron, manganese, nickel, and aluminum. Alkaline neutralization of coal preparation plant effluents is effective in removing toxic trace elements from the solution component of the waste. However, this approach does not confront the long-term problem of acid and trace element releases from the solid waste components that occur upon subsequent leaching. This latent acid generating potential must be accounted for in any permanent disposal scheme to prevent water quality deterioration that may have grave environmental consequences.

The report correctly concluded that:

> Correct assessments of the environmental impacts of coal slurry waste pond leachates require in-depth examination of the surface waters, groundwaters, and effluents from a large number of disposal sites.

Personally, I am unaware that the detailed studies recommended by the Los Alamos National Laboratory have been undertaken. If the proponents and developers of long-line coal slurry pipeline projects have undertaken such studies, their reports have yet to appear in the scientific literature.

I am aware, of course, that the scientific profession on occasion has been charged with requiring studies which are unnecessary to a decision to proceed on developmental projects. For the most part, I disagree with those allegations. And most especially, in this instance, when we are confronting the environmental hazards of an essentially new transportation process, we must be particularly sensitive to the potential for environmental destruction which can be caused -- or avoided.

In short, unlike the atmosphere which surrounded the Arab oil embargo in 1973, or the rush to judgment on synfuels in the late 70's, there presently exists no transportation crisis that warrants the grant of a major impetus to coal slurry pipelines prior to the time that their environmental consequences are more fully known.

4. Breakages, Spills and Other Operating Contingencies.

The two major hazards of slurry pipelines from an operational standpoint are plugging and breakage. Pipeline failures are not unique events. Friction and abrasion are inherent in pipeline movements. The walls of the pipe are eroded and abraded as are the coal particles.

If a failure occurs, the stations upstream from the plug or break must dump the slurry into holding ponds. The holding ponds filled with slurry also pose a threat of environmental damage. Unless a sufficient number of ready buyers are available with provisions to burn the finely divided coal, it is of no value and must be dredged and removed. Downstream from the break or plug large volumes of water must be injected into the pipe to keep the slurry moving to its destination. The flushing water moving downstream contains too little coal to justify dewatering and is too dirty to dump into streams and rivers. Breakage of the pipeline under or near stream beds, farmland, or centers of population would pose serious threats to the quality of the environment and/or to human health.

So in summary, the ecological picture that has been painted by the proponents of slurry transport is not quite as problem-free as they would have one believe. Serious problems exist at both ends and along the entire reach of slurry pipelines. Before we propose to dedicate and degrade billions of gallons of water each year in an already tight water economy, we must consider the consequences of our acts and more importantly address these important questions prior to construction rather than after the fact. We simply cannot afford to make the same mistakes that we have made with our river systems in the past. Reclamation is always more costly than good planning.

The CHAIRMAN. Thank you very much. Before proceeding to the questions of the panel, my colleague from Montana, the Senator from Montana, Mr. Baucus, has arrived.

Senator BAUCUS. Mr. Chairman, if you want to proceed with the panel, that's fine with me. I might learn something myself.

The CHAIRMAN. It will take some time.

Senator BAUCUS. I will proceed then.

The CHAIRMAN. I thought perhaps you might. You may proceed.

Senator BAUCUS. Thank you, Mr. Chairman. If the committee doesn't mind, I will read the entire statement. It is not long, but I would prefer to read the statement in its entirety.

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Mr. Chairman, I would like to first review my longstanding objections to this kind of legislation. The markup of this legislation in the last Congress did not diminish my fears for its long-range impacts on farmers and preemption of State law, and that is primarily the reason why I still oppose this bill.

The conventional wisdom is that the battle over Federal eminent domain is a struggle between industry giants—railroads and pipeline companies—but only in recent years have farmers realized that they are the primary target of legislation like S. 267. For decades farmers have watched, quote, "public purposes" end quote, chip away at prime agricultural lands for highways, rail and barge transportation, utility corridors, gas and oil pipelines.

Today farmers recognize slurry lines as yet another ribbon across their fields requiring access and maintenance. Furthermore, the occasional incidence of rupture and spill at specific sites could damage land and water resources for years.

Thus while slurry's promotional dollars have been targeted at the railroads, the farm community is viewed as equally obstructive, in the view of slurry companies, and at this point I would like to ask permission to enter into the record a March 6, 1982 article from the "Kansas City Times" entitled, "Slurry Firms Widen Request on Route Rights."

The CHAIRMAN. That may be made part of the record.

Senator BAUCUS. It discusses a memorandum prepared for the House Committee on Public Works and Transportation by the Alliance for Coal and Competitive Transportation. That is the slurry industry's lobbying arm. The memo terms railroads, "only a small portion of a coal pipeline's current obstacles." It goes on to warn that non-rail, "adjacent landowners could organize in their recalcitrance and effectively prevent construction of the pipeline at all."

I don't much appreciate a public relations program that tags the Nation's farmers as recalcitrant. An industry with that attitude is not to be trusted I think with the powers granted under S. 267. Far better that they negotiate at arms length or at least under the supervision and regulation of the States.

Frankly, I have little objection to giving slurry pipelines the right to cross railroads under provisions of interstate commerce law. We can do that, for while slurry's PR people have been throwing up the railroad smokescreen, much mischief in other areas of public interest have been overlooked. Through the years of debating this legislation, slurry emerges as one of the most privileged and least regulated industries of America.

To illustrate this point, I ask permission to provide for the record a chart that compares the regulatory structure for other kinds of pipelines with that contemplated in S. 267 for coal slurry. The chart graphically demonstrates that public concerns protected by this committee in the past are a blank page with respect to slurry pipelines.

Look also at the language in the eminent domain section of S. 267, section 7 as referred to by Professor Corker, which says, and I think it is worth repeating.

> In any action or proceeding to acquire rights-of-way under this section, such action or proceeding shall conform to the laws, practices and procedures relating to the general eminent domain law of the State where the property is situated, except that in the case of any such State law, practice or procedure, the effect of which would prohibit any acquisition under this section, such State law, practice or procedure shall not be applicable.

While designed to safeguard against preemption of State law, look carefully at what that language really says. State law will indeed be respected, but only if it does not interfere with pipeline projects.

Even Federal law is given short shrift. For instance, the crossing of wilderness or wildlife refuges is in accordance with applicable law unless there is no feasible and prudent alternative.

In short, the bill creates two classes of citizens—those who must obey the letter of the law, and those who operate coal slurry pipelines.

The question of preemption of State law is far broader than S. 267's thin attempt at protecting sovereignty might suggest. At this point I ask permission to include in the record a summary of court decisions that have over time increased the frequency and circumstances of commerce clause preemption of State and local law. This summary explains why S. 267 fails to confront the issues raised in the first *Iowa* case. More recently we have been confronted with the *Sporhase* and *El Paso* decisions.

I do not doubt that this committee honestly seeks to protect State law. I don't doubt that, that is the intent, but State law is falling by the wayside for constitutional reasons not related to coal slurry. Until this fundamental problem is resolved, we are foolish to encourage those who would benefit the most from a collapse of State law relating to water and other issues.

I would like to think that the language of S. 267 effectively does protect State law, particularly water law, but a panel of expert water witnesses in the House hearings last week couldn't agree on whether the proposed language affords sufficient protection, and while listening to the prior panel, I think this panel also is divided on that question. Certainly the testimony of Professor Corker so indicates. This situation is analagous to hearings before this committee in May of last year when the committee awaited the Supreme Court decision on *Sporhase*. While we dither about the size of the straw that slurry lines can place into the Nation's reservoirs and aquifers and the weight of the club they can carry to enforce their projects' plans, the Nation's Federal district courts are rewriting State water law.

The situation is further clouded by the committee's specific exclusion of termination language in the bill. The previous committee draft so clearly illustrates this deletion that any court of law will determine that Congress did not intend to protect State laws regarding termination. Without this term, a critical protection against drawdowns that interrupt agricultural and municipal uses is missing.

Furthermore, I am not convinced that report language is enough to safeguard State water laws enacted in the future.

In addition, the bill fails to address other categories of State law such as water discharge and environmental requirements. If anything, they are potentially preempted by the, quote, "if feasible" quote, language of the measure. If the committee is serious about safeguarding State law, the protections must be straightforward and specific.

This is not an unreasonable request. Four projects are planned to originate in my part of the country. Between them, they would draw 27.7 billion gallons of water annually from Wyoming to Montana and South Dakota water resources. The least we can expect for such a contribution to coal transportation is respect of our State laws.

Before closing I would like to briefly touch upon the take or pay issue which this committee considered in its 1982 mark-up.

I would like to ask permission to include in the record a copy of the letter of intent which the ETSI project proffered to the City of Wichita some years ago. I'm sorry that a more up-to-date document is not available, but this one I think is adequate.

Potential customers being approached by ETSI in recent months have been cautioned against divulging terms and conditions of that offer. You will see from the letter of intent that ETSI proposes one of the various forms of take or pay contracts. Take or pay means, of course, that the utilities must pay for a certain volume of slurry coal, whether or not it can be used.

In addition, costs are calculated into the tariff, and the escalatable portion of the tariff will be adjusted up or down, end quote, as appropriate. The kinds of costs that are allowed to be passed through on this basis are not listed, but one can imagine what is entailed.

Furthermore, ETSI also requires that a surcharge be applied for costs incurred if new water must be obtained from other sources during the life of the project.

These terms are reminiscent of the way that natural gas companies sheltered themselves from market pressures and internal competition. The impact on costs to consumers hit Congress, as you know, like a bombshell last December. In response, a variety of measures have been introduced to provide relief to gas consumers and to bring order to the natural gas industry. As you know, the most common approach is a provision to reduce take or pay contractual obligations.

Given the seriousness of the natural gas situation for consumers, I believe that S. 267 must include provisions to wean coal slurry promoters away from take or pay contract schemes that hamstring the Nation's utilities.

Finally, Mr. Chairman, I would like to conclude my remarks by asking that a supplemental statement be included in the record, and in summary I make two points. I don't think that there is need for this bill. There is no big emergency for it. Energy prices are volatile. They are changing. OPEC prices are declining. There is less need for this bill than perhaps was the case some time ago.

Furthermore, water law issues are at best extremely clouded. Nobody knows where Sporhase or El Paso are going. We don't know the answer to that. The Supreme Court seems to be moving down the road of making it more and more difficult for Congress to allow States to prohibit the export of water or to allow States their traditional regulatory water scheme, water procedures. It is more and more difficult for us in the Congress to allow States to do what they want to do.

Taken all together, I would suggest that I would go slow and we not enact this bill, and if railroads are the only impediment, the primary impediment to coal slurry, let's just pass legislation allowing coal slurry to cross railroads but not go the full route of this law.

Thank you very much, Mr. Chairman.

[Attachments to Senator Baucus' statement follow:]

The Kansas City Times
Business

March 6, 1982

Slurry firms widen request on route rights

By Rick Atkinson
National Correspondent

WASHINGTON — Unless federal legislation allows coal-slurry companies the authority to condemn private property needed for pipeline construction, most of the projects probably will never be built, according to a memorandum from an alliance of slurry advocates.

Dated Feb. 23 and addressed to the House Public Works and Transportation Committee, the memo acknowledges that problems in crossing railroad property — heretofore the focus of disputes in laying slurry pipeline — are "only a small portion of a coal pipeline's current obstacles."

"Inevitably," continues the four-page note from the Alliance for Coal and Competitive Transportation, "there are non-railroad landowners who could absolutely refuse to grant rights-of-way across their land or demand exorbitant prices in exchange for a right-of-way, driving up the time and expense for construction of the pipeline."

Critics of the seven proposed pipeline systems contend that giving federal eminent domain authority to slurry builders could have unpleasant consequences for landowners in the path of the 7,000 miles of pipeline.

"We think they've been very deceptive because they've continually said that they needed (condemnation authority) to get across railroad property," said Frank Wilner, an economist for the Association of American Railroads. "I think this is the first time that anybody among the slurry advocates has been upfront about the real reasons that they wanted federal eminent domain . . . namely, to get across ranches and farm land."

Slurry pipeline spokesmen contend that is nonsense. Eminent domain powers for the pipelines have been proposed — unsuccessfully — to previous congresses, although the issue of non-railroad property usually was soft-pedaled; such powers have been used for natural gas and petroleum pipes, hydropower lines and railroads themselves when they were opening up the country years ago, supporters say.

The railroads are inflating the eminent domain issue because "they want to keep coal as a captive market for themselves," says Joseph Hillins, executive director of the coal alliance. And without that federal authority, most of the underground pipelines will die on the drawing board, added George Eatman, executive director of the Slurry Transport Association.

The alliance memo counterpunches at behind-the-scenes efforts to limit pipeline domain privileges strictly to railroad property; such thinking is denounced as "sham," "bad policy" and destined to doom "construction of interstate pipelines."

The eminent domain dispute apparently will not affect a pipeline planned by the Energy Transportation Systems Inc. The pipeline from Wyoming through Kansas to Arkansas is still on schedule, and construction is scheduled to begin next year, said George R. Coffey, spokesman in San Francisco for ETSI, as the firm is known.

ETSI has won the right to cross railroad property in 65 successful lawsuits; roughly 70 percent of the other 5,000 landowners have agreed to right-of-way terms during negotiations begun 14 months ago, Mr. Coffey added.

As currently envisioned, the ETSI project will crush Wyoming coal to the consistency of sugar, mix it with water and pump 25 million tons annually to power plants in Oklahoma, Arkansas and Louisiana.

But there is "no doubt that federal eminent domain is necessary" if the other projects are to be built — something supporters think is crucial to reduce dependence on foreign oil.

"Adjacent landowners could organize in their recalcitrance and effectively prevent construction of the pipeline at all," the alliance memo says.

Some farm groups, already hostile over the amount of precious water needed to mix the slurry, are inflamed further at the idea of pipeline companies having federal authority to condemn farm and ranch land.

"They thought they could avoid a lot of farmer resistance by blaming it on the big, bad railroads," says Bob Mullins, a lobbyist for the National Farmers Union. "And that's just not true. We are determined to block those pipelines until they can figure out a way to pipe the water they use back to where they got it in the same quantity and quality."

Mr. Eatman contends that construction of the underground pipelines would disrupt a farmer's crop on that tract for only one season and that the farmer would receive adequate compensation paid to cover both the crop and the land.

Sources close to the public works panel say it is unclear how the legislation will fare. President Reagan in November endorsed the slurry pipelines, but suggested the eminent domain issue best be left to the states.

COMPARISON OF REGULATORY REQUIREMENTS FOR PIPELINE RIGHTS-OF-WAY ACROSS FEDERAL LANDS

Pipeline Requirements	§ 28a of the Mineral Leasing Act (30 U.S.C. § 185)	Northern Tier Oil Pipeline	Alaska Natural Gas Pipeline	Trans-Alaska Oil Pipeline	Coal Slurry Pipelines Under Senate Bill 267
Right-of-Way Width Limitation	X (50 feet)	X	X	X	
Pipeline Safety Requirements	X	X	X	X	
Financial Disclosure by Pipeline Sponsor	X	X	X	X	
Public Hearings/Public Comment	X	X	X	X	
Reimbursement by Pipeline Sponsor of Application Processing Costs	X	X	X	X	
Annual Advance Payment of Fair Market Value of Right-of-Way or Permit	X	X	X	X	
Bonding Requirements	X	X	X	X	
30-year Limit on Right-of-Way or Permit	X	X	X	X	
Abandonment is Grounds for Suspension of Right-of-Way or Permit	X	X	X	X	
Joint Use of Right-of-Way with Compatible Uses	X	X	X	X	
Construction, Operation, Maintenance and Regulation as Common Carriers	X	X	X	X	
Inspection by DOT	X	X	X	X	

Pipeline Requirements	§ 28a of the Mineral Leasing Act (30 U.S.C. § 185)	Northern Tier Oil Pipeline	Alaska Natural Gas Pipeline	Trans-Alaska Oil Pipeline	Coal Slurry Pipelines Under Senate Bill 1844
Reporting of Spills, Leaks, and Explosions	X	X	X	X	
Interagency Cooperation	X	X	X	X	
Applicant to provide specific details of route, information for EIS		X			
Specific criteria for pipeline system approval including information on feasibility of financing; environmental impacts; reliability of cost estimates and risk of cost overruns; net national economic costs and benefits of each such system; effect on international relations; impact on competition; degree of safety and efficiency; capacity and cost of system expansion; relationship of system to national energy policy and to national security considerations		X			
Publication of findings		X	X		

Pipeline Requirements	§ 28a of the Mineral Leasing Act (30 U.S.C. § 185)	Northern Tier Oil Pipeline	Alaska Natural Gas Pipeline	Trans-Alaska Oil Pipeline	Coal Slurry Pipelines Under Senate Bill 1844
Civil Rights Affirmative Action			X		
Equal Access to Facilities			X		
Export Limitations			X		
Strict Liability				X	
Pipeline Liability Fund				X	
Control and Removal of Pollutants at Expense of Right-of-Way Holder				X	
Waiver of certain provisions available only upon Presidential recommendation and Congressional joint resolution		X	X	X	

September 17, 1981

FEDERAL PREEMPTION OF STATE LAWS UNDER H.R. 4230

A major concern regarding H.R. 4230, which would bestow a federal right of eminent domain on coal slurry pipelines, is the extent to which it would preempt states' rights and states' laws. Eminent domain is traditionally an area of state not federal control, and H.R. 4230 could set a dangerous precedent, reversing this historic pattern. It appears that H.R. 4230 would preempt state laws in a broad series of areas.

A. THE LEGAL FRAMEWORK OF FEDERAL PREEMPTION

Congress would enact Federal coal slurry pipeline eminent domain legislation pursuant to its authority under the Interstate Commerce Clause of the Constitution (Article I, Section 8). If an inconsistency appeared between a State law and this Federal eminent domain law, there is a presumption, developed by the federal courts, that the Federal law totally preempts State law in the area. Gibbons v. Ogden, 9 Wheat 189 (1824).

Courts have held that this presumption of federal preemption can be rebutted where statutory language or legislative history makes clear that Congress did not intend to preempt the field in question.

A review of H.R. 4230 shows only two limitations on the scope of federal preemption: (1) Section 10 intends that state water law not be exempted; and (2) Section 10951(c) provides limited protection for state-designated historic site and wilderness or wildlife areas, suggesting that they be respected unless there is "no feasible and prudent alternative" to infringing on such sites and areas. Clearly, broad areas of state law aside from these two points could be preempted by H.R. 4230. It should also be noted, as discussed below, that the attempt in Section 10 to avoid preemption of state water law may be ineffective. Furthermore, the "no feasible or prudent alternative" language, in effect, waives much of the state law controlling historic sites or wilderness areas. In summary, the statutory language of H.R. 4230 would not prevent broad federal preemption of state laws.

The Supreme Court, in National League of Cities v. Usery, 426 U.S. 833 (1976), developed some restrictions upon federal preemption, pursuant to the Commerce Clause, of state laws and regulations. In Usery, the Court invalidated an attempt by Congress to prescribe maximum hour and minimum wage limitations for public state employees. The Court found that in circumstances where a state or local governmental entity performs traditional governmental functions integral to the operation of that governmental entity, federal Commerce Clause regulation may be limited.

In addition to the state role as employer of public workers, the Court enumerated other services that were integral to the governmental function, including "fire prevention, police protection, sanitation, public health, parks, and recreation." Id. at 851. Since 1976, federal courts have defined further the scope of "integral governmental functions" that leave state action immune from federal preemption. See, generally, Hughes Air Corporation v. Public Utilities Commission, 644 F.2d 1334 n.5 (9th Cir. 1981). For example, in Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), the Court held that federal air pollution requirements did not impinge on states' rights within the limited exception of Usery. The Court made clear that the broad interstate nature of efforts against air pollution precluded the problem from falling within a state's traditional governmental function. While the particular facts differ from those surrounding H.R. 4230, the rationale is equally applicable: like air pollution, energy transportation has interstate implications. The Friends of the Earth approach, therefore, as applied to federal coal slurry eminent domain legislation, suggests that a broad range of State laws and activities will not be protected from federal infringement within the Usery exception.

B. H.R. 4230 WOULD PREEMPT STATE COAL SLURRY EMINENT DOMAIN STATUTES

In Cooley v. Board of Wardens, 53 U.S. 299 (1851), the Court established a general rule that where subjects of commerce "imperatively demand a single uniform rule," the power of Congress is exclusive. In those fields where national uniformity is not essential, either the state or federal government may act. While it is highly questionable whether coal slurry pipelines require uniform national treatment, the fact that

Congress in H.R. 4230 would establish a system of federal eminent domain is an indication of its intention to preempt the field. State statutes that cover the same subject matter or are in direct conflict with Congress' exercise of authority are therefore necessarily superceded. See, generally, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (city's attempt to regulate the air traffic hours within its borders was invalidated due to existing federal regulatory scheme).

A number of states have passed statutes allowing State grants of eminent domain to coal slurry pipelines. In many cases, these statutes contain restrictions and limitations upon the coal slurry pipeline's exercise of eminent domain authority. Even given Usery exceptions, these statutes clearly would be inconsistent with and preempted by Federal eminent domain legislation.

For example, at least twenty states now have statutes that permit a grant of eminent domain to a coal slurry pipeline. Ala. Code Title 10, §10-5-4; Ark. Stat.Ann. §73-1901; Fla. Stat.Ann. §361.08 (West); Iowa Code §§490.2, 290.25; La. Rev.Stat. Title 30, §723 (West); Code of Mont. §8-203; N.H. Rev.Stat. Chap. 371 §1; N.J. Stat.Ann. §48:10-1; N.Y. Transp. Corp.Law, Art. 7 §8; N.C. Stat. §62-190; N.D. Cent.Code §49-19-12; Ohio Code §§1723.10, 1723.02; Okla. Stat.Ann. Title 27 §7.2; S.C. Code §58.6; S.D. Compiled Laws Ann. §49-7-13; Tenn. Code §65-2801; Tex. Code Ann. Title 3 §111.019; Utah Code

§78-34-1; W.Va. Code §54-1-2(e); Wyo. Stat., §1-26-814. In addition, five states (Arizona, Colorado, Idaho, Indiana and Oregon) have eminent domain statutes where coal slurry pipelines may be included, depending on intepretation of legislative history. A number of other states are considering coal slurry eminent domain legislation.

However, most of the states granting eminent domain to coal slurry pipelines, to protect state interests, have often enacted restrictions upon both the manner in which such power can be invoked by the coal slurry companies, and the conditions under which the power can be exercised. The statutory schemes of Florida, Texas, and Oklahoma are illustrative of the nature of such state-imposed restrictions.

In Florida, the legislature has provided that any corporation operating a coal slurry pipeline, that would "exercise or intend to exercise" the power of eminent domain pursuant to Florida law, shall be subject to strict regulation by the Florida Public Service Commission (PSC). Fla. Stat.Ann. §350.80. In addition to traditional prohibitions against discriminatory rates, the Florida law provides that the Florida PSC shall have access to appropriate financial records of regulated coal pipeline companies to prevent undue profits by any utility companies which participate in the pipeline company itself. Id. H.R. 4230 clearly runs the risk of eliminating this salutary attempt by Florida to regulate the financial impacts of coal pipelines within the State.

In Texas, the legislature has expressly limited the eminent domain power of coal slurry pipeline companies to exclude the use of such power for the condemnation of water or water rights. Tex. Nat.Res.Code Ann. Title 3, § 111.0192(a) (Vernon). In the same statutory provision, the legislature has explicitly provided that no Texas water shall be used in connection with coal slurry pipeline transportation, operation, or maintenance. Id. H.R. 4230 would run the risk of preempting this effort by Texas to protect its water resources from exploitation in a coal slurry scheme.

Similarly, in Oklahoma, the legislature has provided that with respect to coal pipelines, "the power of eminent domain shall not include the right to take water," and that "no Oklahoma water from any source shall be used in connection with the transportation, maintenance, or operation of a coal slurry pipeline within or through the State of Oklahoma." Okla. Stat.Ann. Title 27, §§ 7.1, 7.6.

In addition, Oklahoma has enacted other statutory provisions which limit the rights of coal pipeline companies to exercise the power of eminent domain, including provisions which require such companies to file with the State Corporation Commission an "explicit authorized acceptance" of all applicable provisions of the state act relating to coal pipelines. Among other items, that act reserves to the State the power to limit the width and route of coal pipeline rights-of-way, the power to regulate rates and charges of coal pipeline companies, and the power to require the coal pipeline companies to bear the expense of relocations occasioned by their pipelines. Okla. Stat.Ann. Title 27, §§ 7.1-7.11. This entire set of statutory protections against potential excesses by coal pipelines in Oklahoma could be vitiated by H.R. 4230.

C. H.R. 4230 WOULD PREEMPT OTHER STATE STATUTES

Federal legislation can also preempt state action when the state regulation conflicts with federal policy objectives. Such conflict is determined by the nature and extent of the burden imposed by the regulation, and the relative weights of the state and national interests involved. In one case, the Court even held the cost of compliance with state regulations to be a relevant factor in determining whether the state had burdened interstate commerce. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Various state statutes regulating land management, water use and control, pollution, and resource management will create additional procedural roadblocks to the development of coal slurry pipelines. As the purpose of Congress in promulgating H.R. 4230 is to facilitate the transportation of coal by pipeline, a strong argument can be made that these state statutes will now be preempted.

States traditionally have had broad control of land use within their borders. Florida, for example, which would be crossed by one of the proposed coal slurry pipeline projects, has a land use act that establishes geographical areas of "critical concern" within the state and establishes guidelines for growth and development planning within those areas. Fla. Stat.Ann.Ch. 380. One of the provisions of that act attempts to organize and manage development in areas "having significant impacts upon, or being significantly impacted by, existing or proposed major...energy facilities." § 380.05. The requirements in this act might very well conflict with coal slurry pipeline development pursuant to a federal eminent domain law, and likely, therefore, would be preempted. Every state has a network of zoning and planning statutes governing commercial and industrial land use, and these statutes could also be preempted by federal eminent domain laws.

Again using Florida as an example, a broad range of its resource and construction management laws similarly could conflict with, and be preempted in significant part, by a federal coal slurry eminent domain law. These laws include: Florida's Environmental Control Compact (Fla. Stat. Ann. §403.60); Florida's Beach and Shore Preservation Act (Fla. Stat.Ann.Ch. 161); Florida's Coastal Management Act (Fla. Stat.Ann. § 380.21-25); Florida's waters and wetlands construction laws (Fla. Stat.Ann.Ch. 253); Florida's Pollutant Spill Prevention and Control Act (Fla. Stat.Ann.Ch. 376); Florida's groundwater control laws (Fla. Stat.Ann.Ch. 403); and Florida's Water Resources Act (Fla. Stat.Ann. §373.013-443). A broad range of permitting and licensing statutes could be preempted as well. Most other states share similar statutory schemes in these areas and would be similarly affected.

All state safety laws and regulations covering such areas as design, installation, inspection, emergency plans, testing, construction, operation and maintenance would be specifically preempted by Section 11 of H.R. 4230, which establishes a federal regulatory regime in this area, in effect removing it from state control.

In summary, a federal eminent domain law for coal slurry pipelines would cut broadly into the ability of states to regulate their own land use, resource development, construction management and safety problems.

D. H.R. 4230 COULD PREEMPT STATE WATER LAWS

Section 10 of H.R. 4230 apparently intends to avoid federal preemption of the ability of a state to grant or deny water use or condition that use. However, because of previous judicial interpretations of comparable language in other legislation (see, for example, First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946)), the language in H.R. 4230 may be inadequate to accomplish this result.

In First Iowa, the Court held that despite a specific provision in the federal statute protecting state laws from being superseded, Iowa's licensing requirements for dam construction and operation were preempted by the Federal Water Power Act. The Court found that the federal government, through its legislative efforts, sought to promote the development of national water sources. As the state procedures frustrated Congress' overall policy objectives, the "preservation of states rights" clause was struck down by the Court. See also, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958) and City of Fresno v. California, 372 U.S. 627 (1963) (provisions delegating control to the states were ignored due to inconsistencies with Congressional directives).

The Court again addressed federal preemption of state water laws in California v. United States, 438 U.S. 645 (1978). Although recognizing a policy favoring state regulation of water within its boundaries, the Court held that in determining the applicable law, the scope of the federal project and the federal interest in question, in light of the legislative history, must be weighed against the specific state water law. The provison authorizing state control of water rights was not controlling if a specific state law imposed restrictions inconsistent with the Congressional directive. As the essential purpose of H.R. 4230 is to "facilitate the transportation of coal by pipeline," it is likely that state statutes affecting the movement of coal in interstate commerce, including a state's limitation or curtailment of water supplies to an operating coal slurry pipeline, would be struck down as a burden on interstate commerce conflicting with the purposes of H.R. 4230, absent an unequivocal Congressional statement consenting to such state regulation.

Serious ambiguities remain in Section 10. For example, Section 10, may not protect future legislative action by states altering water use or availability, from federal preemption. The Supreme Court took this view in 1973 when it failed to retroactively apply a Louisiana statute which would alter property rights, previously established under the Migratory Bird Conservation Act of 1929. U.S. v. Little Lake Misere Land Co., 412 U.S. 580 (1973). Despite the state's legitimate interest in facilitating federal land acquisitions, the Court held "that interest has no application to transactions already completed at the time of the enactment." Id. at 599. Future state laws, therefore, enacted after H.R. 4230, that would alter or place additional requirements on coal pipeline companies' acquisition of federal and non-federal lands, would likely be unenforceable. Other ambiguities in H.R. 4230 suggest that numerous existing state statutes could be preempted. For example, where one state sharing an aquifer with another allows a coal slurry pipeline to draw water from the aquifer, the bill provides no protection to the affected state in preventing the loss of its share of the aquifer.

Wyoming, for example, has a statute barring use of state water outside the state without prior legislative approval. Wyo. Stat. §41-10.5 (Supp. 1974). As another example, Montana law precludes water for the slurry transport of coal from being considered as a "beneficial use," therefore blocking such use of state water. Mont. Stat. §85-2-104 (1979).[1/] A number of

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[1/] It should be noted that H.R. 4230 specifically overrules and preempts Montana's statute by establishing, in Section 2(2), that coal slurry transport is a "beneficial public use."

other states have comparable laws. Such water laws have not been immune from attack by the federal courts under the Commerce Clause (see, for example, Altus v. Carr, 255 F.Supp. 828 (W.D. Tex. 1966), aff'd per curiam, 385 U.S. 35 (1966)), and the federal eminent domain provisions of H.R. 4230 could further jeopardize these laws.

E. CONCLUSION

To summarize, the federal eminent domain provisions in pending coal slurry pipeline legislation (H.R. 4230), could preempt and invalidate a broad series of state laws, ranging from state eminent domain laws, to state land use laws, to state water laws.

Energy Transportation Systems Inc.
P.O. Box 3965. San Francisco, Ca 94119
Telephone (415) 764-7080/7081

February 13, 1976

Mr. Grover E. McKee
Director of Economic Development
City Hall - 11th Floor East
455 North Main Street
Wichita, Kansas 67202

Dear Mr. McKee:

Energy Transportation Systems Inc. (ETSI) proposes to finance, design, construct, own and operate a coal slurry pipeline system capable of transporting 8 million tons per year of coal in slurry form to a point in the immediate vicinity of Wichita, Kansas, and delivering dewatered coal. The City of Wichita will contract with ETSI for 8 million tons per annum, for which ETSI will charge the tariff described below.

Wichita and other shippers will be responsible for supplying coal and receiving coal and water, as scheduled, at agreed quantities and qualities. All risks, liabilities and indemnifications connected with such supply and receipt will be borne by each shipper in accordance with the terms of its tariff. The firm take-or-pay transportation agreements will require that each shipper pay the tariff even though coal is not actually available for transportation or coal and/or water cannot be received or utilized by shipper at the destination point.

Conversely, any shipper who furnishes coal for transportation in accordance with such contract, and is not prevented from receiving and utilizing coal and water, will be excused from payment of the tariff with respect to any period of time during which ETSI does not transport the coal as called for in the transportation contract.

The term of the transportation contract will be 30 years.

The tariff charged by ETSI will be $ * per ton. This tariff consists of a fixed charge of $ * covering all fixed costs and an escalatable charge of $ * covering escalatable costs.

*Supplied by sealed bid and subject to ICC approval.
To be opened when qualified competitive bids available.

This tariff proposal is based upon ETSI's best current estimates of capital costs and other costs related to the development of the project. Following construction, the fixed portion of the basic tariff will be adjusted to final cost (including capitalized interest) of the project to reflect any differences from the estimated capital cost, the assumed interest rate and the assumed debt equity ratio.

"Interest rate" means the composite costs of money, including all fees, commissions, discounts and other charges related to debt but excluding equity.

Also following construction, the escalatable portion of the tariff will be adjusted up or down to conform to the then forecasted cost of the items listed in Exhibit A. The escalatable charge is subject to escalation on the basis set forth in Exhibit A hereto(submitted in sealed bid only).

It is understood that the above mentioned tariff is based on a 35 million ton per year system - 8 million tons per year to vicinity of Wichita, 15 million tons per year to White Bluff, 12 million tons per year unallocated at this point. The tariff will of course be adjusted in equitable fashion when the final configuration has been fixed.

ETSI will assume responsibility for supplying water for the project and has rights to the water, but ETSI will agree to provide from this source enough water to transport Wichita coal. In the event this supply of water becomes unavailable, after completion of the pipeline, ETSI will develop a solution and perform the actions necessary to provide a water supply. ETSI will recover the net capital and operating costs thereof as a surcharge addition to the tariff rate, to include a return on equity of 15%.

If the above proposal is acceptable, we propose to execute a mutually agreeable transportation contract which will become effective when (1) commitments are in hand for the balance of the total 35 million tons per year throughput, (2) assurance is in hand that crossing of the railroads by eminent domain or other means is possible and (3) commitments are received for financing. This offer will remain open for 6 months and may be extended by mutual agreement.

Very truly yours,

E. J. Wasp
E. J. Wasp
Vice President

Approved:________________
By City of Wichita
Grover E. McKee
Director of Economic Development
[illegible]

For: The Hearing Record on S. 267
From: Dorothy Bradley, Montana Democratic National Committeewoman
Representing the Montana Democratic Party
3/14/83

On behalf of the Montana Democratic Party, I am expressing our opposition to S. 267.

For at least a decade the Montana legislature and the Montana Democratic Party have opposed the use of coal slurry pipelines for the transportation of coal and water. That position was strongly reaffirmed in two separate sections of the Montana Democratic Party's 1982 platform.

Our concerns about the proposed act are as follows:

First, the power of eminent domain traditionally has been limited at the federal level for purposes of national defense or interest. This cautious approach should not be abandoned. Slurry pipelines are clearly not an item of national defense or interest at this time.

Second, the Wallop amendments appear to fall short of protecting state statutes that prohibit the use of water for coal slurry. Montana's statute provides that the use of water for slurry transport of coal is not a beneficial use. Nowhere in the proposed act is such a state statute clearly upheld. Montana is a state of light rainfall and periodic drought. Our statute is a carefully considered reflection of that fact. We want that statute maintained.

Third, the proposed act is silent on a state's ability to stop or cut back on water for coal slurry once such transport has begun. There are no safeguards for necessary or higher priority uses in a drought.

Fourth, the proposed act focuses on compliance with the laws of the state of water origin, giving no consideration or protection to downstream states. Aquifers do not stop at state boundaries. Decisions on the use of water for coal slurry cannot be made as if they did.

Fifth, the new issues raised by Sporhase v. Nebraska should be studied and addressed by both the U.S. Congress and the state legislatures, prior to and outside the context of coal slurry. Sporhase raises many complicated questions about what states can and cannot do with water, and what Congress can do. Congress should undertake a comprehensive study on all the issues, consider all its options, and not hastily address Sporhase in the context of slurry as this proposed act would do. Congress should ensure that states have the time to do the same.

Thank you for the opportunity to express our concerns.

The CHAIRMAN. Thank you, Senator.

Senator, I have just one question. If you were to assume that a pipeline could get the right-of-way without Federal eminent domain, and therefore were able to construct the pipeline, what protection do Montana farmers have for their water?

Senator BAUCUS. If legislation were to enable slurries eminent domain?

The CHAIRMAN. If they were able to get the right-of-way to construct without Federal eminent domain, and we pass no legislation at all, what protection would the farmers of Montana have?

Senator BAUCUS. I think a lot of the same problems would still abide.

The CHAIRMAN. Wouldn't they all be there?

Senator BAUCUS. At this point, after further thought, I think you are right. They all would still be there.

The CHAIRMAN. If we wish to give them any protection which they don't have under existing law, we would have to legislate?

Senator BAUCUS. I think we would have to legislate. The question is the degree to which this committee is willing to make such legislation so specific that a Federal court would have no option but to grant those States——

The CHAIRMAN. Shouldn't the question be then, not whether or not we should legislate, but how we should legislate?

Senator BAUCUS. I think that is true, but I don't know the answer to that question because as you know, this is such a murky area. I don't think any of us are in full agreement as to how best to accomplish that purchase.

The CHAIRMAN. Senator Johnston.

Senator JOHNSTON. Thank you, Mr. Chairman. I have no questions for Senator Baucus other than to concur with your question, but I would like to ask Professor Corker, you seem to indicate that one of your chief objections here was that a Cabinet member may authorize the commitment of water. Did I understand that correctly?

Dr. CORKER. I think that it would be understood, a license to a coal slurry pipeline would be understood as a commitment of water to that coal slurry pipeline.

Senator JOHNSTON. I think the chairman wants to question Senator Baucus first.

The CHAIRMAN. I thought we could see if other members have questions they wanted to ask of Senator Baucus and then we can turn to the questions of the panel.

Senator WALLOP. I have no questions. I would observe which I think that you have, under the present set of circumstances created by *Sporhase,* expanded or narrowed by the *El Paso/New Mexico* decision and others have taken place, our States are virtually naked in their armory if you will, their armor to protect themselves from the slurry pipelines, but there are a lot of other things we might find offensive. This is an opening begun, and clearly we have to do something if we are going to provide them other than to say that it is murky and nobody knows, because as we let time pass we will know very specifically, the courts will expand year after year and decision after decision on what I consider to be very specific inroads into traditional consent of States and their control of water.

Senator BAUCUS. I think that is true, Senator Wallop, but I, therefore, suggest that we focus more of our attention on developing some comprehensive approach to water law and first because that to me is the horse before the cart rather than passing eminent domain legislation which is putting the cart before the horse.

The CHAIRMAN. Senator Ford.

Senator FORD. No, thanks.

The CHAIRMAN. Senator Melcher.

Senator MELCHER. I want to commend my colleague for very direct testimony.

The CHAIRMAN. Thank you very much.

Senator BAUCUS. Thank you, Mr. Chairman. I apologize to the panel for the interruption. Thank you very much.

The CHAIRMAN. Now Senator Johnston.

Senator JOHNSTON. Thank you, Mr. Chairman.

Mr. Corker, your statement says the bill authorizes the secretary to commit water rights—I would suggest to you that section 4 specifically states that the Secretary can't even entertain the application until and unless the applicant has secured water rights pursuant to State law as further set forth in section 5. So it is not the Secretary who commits the water rights or authorizes those water rights.

What the Secretary does, after the individual pursuant to State law gets his water rights, is authorize Federal eminent domain, but he doesn't do anything to bless or sanctify the acquisition of those water rights under the law.

Dr. CORKER. Senator, I hope you won't think I am unduly difficult, but the water right as we understand it in the West is perfected after the water is committed to use, and the water right, before it is committed to use, when there is merely an incohate piece of paper, is not a water right. The water right I think has to come after. If it needs eminent domain power, it has to have secretarial intervention.

Senator JOHNSTON. The Secretary doesn't authorize the use of water. What he authorizes is the eminent domain.

Dr. CORKER. He does not perform the function of the State engineer. The State engineer may not do so beyond his State lines, which means that there is a no man's land after that water is exported which is beyond the control either of any Federal official or of any State official. That is my primary objection to that.

Senator JOHNSTON. Well, under the present law, if a State proposes to authorize or sell as you say water to another State, and it is beyond what properly ought to be apportioned, any downstream State has two remedies, as I understand it. One is to go to the court under the equitable apportionment doctrine, and the other is under an interstate compact if one exists. Am I correct?

Dr. CORKER. That is correct.

Senator JOHNSTON. Now what in this bill takes away either one of those rights?

Mr. CORKER. I think the declaration that a use of water for coal slurry pipeline is public beneficial use is likely to take away any right to an equitable apportionment, if that is an ingredient to which the court looks at the law of equitable apportionment which is a fairly loosely and openly defined concept.

Senator **Johnston**. May I ask the panel if they agree with that?

Dr. **Corker**. That is the initial finding.

Mr. **Widman**. I would have to say that I disagree. As I recall the report from last year it was somewhat more explicit on this point. This does tie in with one of the suggestions that I made, that in addition to referring to interstate compacts, you may also wish to refer to State shares allocated under other doctrines.

Senator **Johnston**. Is that under that definition that you spoke about?

Mr. **Widman**. It could be covered there. It could also come in at several other points. One is in the opening paragraph which refers to "interstate compacts" in subsection 7. The other is back in section 5c(1), where there is a reference to "interstate compacts."

You might want to clarify, either in the report as last year, or in the statute itself—the statute being preferable—that the State shares, no matter how determined, would be protected. It is not just the interstate compact shares which are to be explicitly protected. It seems to me that is a point that is easily remedied.

Dr. **Corker**. May I interject a question to Mr. Widman?

Senator **Ford**. Go ahead.

Dr. **Corker**. My question of Mr. Widman is how do you determine a State's share in a multistate ground water, surface water resource?

The primary ingredient of equitable apportionment is water in use, and whether the State's share which is diverted from State A outside of downstream State B and C, around downstream B and C, is part of their share or not.

Senator **Johnston**. This bill does not interfere with that in any way.

Dr. **Corker**. I think, Senator, that it provides the most persuasive argument that that water has already been committed to use and the ingredient of equitable apportionment declared expressly in the Wyoming 235 U.S. report is prior appropriation modified by any consideration needed to protect existing uses of water, and this bill obviously does deal with existing uses of water for coal slurry pipelines in an unstated number of pipelines, unascertainable number, unstated and unascertainable quantity.

Mr. **Widman**. Shall I respond to that? I think the most recent Supreme Court decision on equitable apportionment which Mr. Clyde referred to, *Colorado* v. *New Mexico,* makes it clear that even a complete, 100-percent use of the supply of a river by one State, does not cut off another State that otherwise would have no share under a prior appropriation-type allocation.

In that case, Colorado, which was not using any of the river's water, ended up getting an allocation of a share of the river, even though the river's flow was being used entirely by New Mexico, I think it is clear that in the equitable apportionment doctrine, while the extent of use is a factor, it certainly is not controlling. On top of that, it seems to me that if a downstream State were to have some fear about water being taken, to the extent that it would damage the downstream State, it always has an opportunity to go into the Supreme Court and start proceedings and get an equitable apportionment. If there were damage threatened, it could ask for and get an injunction.

Senator JOHNSTON. Do you agree with that, Dean?

Dr. TRELEASE. Yes. I think that the idea of an equitable apportionment exists before the actual apportionment. Mr. Corker called the streams a public good, a common good. Really the pie is split, and I could either sell my share and he sell his. Now before the pie is cut, I think I can nibble on my side and he can nibble on his side, and this is the way it is done.

I think his objection would preclude any State from making any sort of commitment to a consumption use even for a farmer, rancher, until an equitable apportionment. We have never had that.

Senator JOHNSTON. Mr. Clyde?

Mr. CLYDE. I agree with what Dean Trelease just said. The U.S. Supreme Court in a case in Colorado, *Irrigation Company*, squarely held that if Colorado had issued permits which exceeded Colorado's share of the river, the State engineer had to take the water away from those permittees and send it to New Mexico. That is clearly the thrust of this December 13 decision between New Mexico and Colorado. As Gary indicated, New Mexico was using 100 percent of that water. Colorado, the upstream State, wasn't using any. The Court still held that Colorado had an equitable share of the river and it had to be honored, and this bill simply doesn't affect that one way or the other.

Senator JOHNSTON. It is certainly intended to, and I think you are right. It is clear on that point.

Let me ask you this, Dean Trelease. You referred to a massaging of the language of the bill. If the statutory language of S. 267, particularly the report, contained the same language as it did last year, would it validate State statute such as that in Montana which expressly prohibits the use of water in coal slurry pipelines? And should it or shouldn't it be amended to do so? Let me start with you, Mr. Clyde.

Mr. CLYDE. I have some question as to whether the language as written is going to have that effect because I think that you only are validating valid State law, and under *Sporhase and the City of El Paso* case I think you have to at least assume they are in jeopardy.

You want to tighten that up. I have suggested some language in my statement that expressly says that the States may embargo water to the extent reasonably necessary to protect or compensate them for their economic interest there. I think when you make an interstate apportionment, what you are in effect saying is that this State has an interest in jobs, payroll taxes, the things that flow from putting water to beneficial use.

If you take the water out of State, those things may occur in the State where the water is put to use. There is a real economic loss. I think if you indicated that expressly, that Congress approved embargo legislation to compensate for that factor, then there would be no doubt whatever that it would have that effect. It is not that clear cut in the language used.

Dr. TRELEASE. My position is that it is similar to the one that was expressed to another committee by Caroll Dinkins of the Department of Justice, Natural Resources Section. If you take the bill and the legislative history, particularly the report, and read them together, I think that the answer to your question is yes, they would be validated.

However, it has been pointed out by others that perhaps they would look only at the bill, and it is difficult to predict what the Supreme Court will do. Sometimes it looks very strictly at the words of the language of the bill itself. Sometimes it almost ignores the language and looks only to the legislative history.

Senator JOHNSTON. Let me interrupt you at that point and ask you this, Dean Trelease. You heard Mr. Clyde say that we would perhaps go another step, say that to authorize a State to the extent reasonably necessary to protect its economic interest in that water, to put conditions upon it.

In your view, is that as far as we could go? Does *Sporhase* have an implicit limitation on the extent to which the Congress may authorize a State to prohibit the export of water?

Dr. TRELEASE. I don't think it is as far as the Congress could go. It may be as far as you wish to go, sir. Now that would meet the main objective. The main point I tried to raise what we are trying to do here, what I hope you are trying to do here, is to protect the States' public interest and make sure that when others come to take the water away something is left behind, something equivalent to what would have happened if the water had been used in the State.

Now I think it would be possible to do more, but it may not be necessary or desirable to do it. I think that is for the committee, Congress.

Mr. WIDMAN. You have touched on one of the points that did concern me, and I mentioned that in my prepared statement. I think that the proposed legislation, without the benefit of a report as you had last year, is somewhat ambiguous on that point.

I think that last year's report did deal with the point. But in an abundance of caution, in my statement this year I suggested that in the case of State water law restricting export of water, which law might be argued to be invalid on the grounds of improper interference with interstate commerce, that law should not be deemed invalid for that reason insofar as it applies to water used in a certified pipeline. I think that would make it abundantly clear, and would take care of the problem you are now discussing.

Senator JOHNSTON. Thank you.

The CHAIRMAN. Senator Wallop.

Senator WALLOP. Mr. Chairman, I would like to begin by making an observation.

Professor Corker, I certainly hope that we do not ever launch on a new kind of concept in water law which would require each upstream State to consult with every downstream State before every water allocation decision is made, even though those waters may not have been apportioned or been compacted, because I can tell you that as a State, in Wyoming with only a little bit of the North Platte flowing into it and everything else flowing out of it, we would have precious little leverage and likely would not ever find anybody downstream to agree to any use. What's in it for them?

Dr. CORKER. Well, I think this is what is unprecedented in the confrontation that now exists between ETSI and the downstream

States, which is the cash sale of whatever it is that ETSI gets. It can be characterized as water or water rights or permission to build a pipeline with the privilege of eminent domain. Whatever it is ETSI gets, the consideration belongs only to the upstream States, and I think that is a harmful precedent that every State ought to be concerned about, and I think as soon as it is appreciated by the States, every State is likely to be concerned about it.

Senator **Wallop**. I don't know what the position of South Dakota is in that, but I assume their position is that that is a part of a share of the reservoir water to which they are entitled, and that as a matter of State authority over a given volume of water, the State can do what it wishes with that.

Dr. **Corker**. Well, Senator Wallop, I would like to refer you to a publication that was just published in January, and I just read it yesterday on the airplane. It is by the legislative extended assistance group for the Iowa General Assembly, and it is captioned, "Interstate Cooperation and Water Resources Management," and it has a fairly graphic picture of I think Iowa's downstream position and concern, and I think genuine reasons for concern about how much of what Iowa has regarded as its share of the water will be diverted around the State of Iowa by the proposed ETSI pipeline and by others.

Senator **Wallop**. Would you suppose that Iowa would make the same objection to a steam-generating plant that consumed—and after all, we are talking about the concept of consumption, use of water in either pipelines or steam-generating plants, that the water is just as gone at the conclusion of the use. Would you assume that Iowa would make the same judgment about a steam-generating plant?

Dr. **Corker**. Not for use within the State of Iowa or within the State of South Dakota; there is kind of common law on this subject. It has been generated by pretty near every interstate compact that has been drafted, the first one in 1922, and that is the interstate compacts provide, like the Colorado River compact, like the upper basin compact, that water shall be used exclusively within the territory of the States which are parties to the compact.

Now that as a State law would be offensive perhaps to the constitutional provisions as now read by *Sporhase*, but this water is regarded as being the water of the States which now have access to it.

Senator **Wallop**. You would agree, would you not, that the effect on Iowa is the same?

Dr. **Corker**. The effect on Iowa potentially is much larger. If the State of South Dakota can sell it, then the State of South Dakota is limited to the use that Iowa can make within the State.

Senator **Wallop**. Assume they sell it to a steam-generating plant.

Dr. **Corker**. If they sell it to a steam-generating plant out of State for consideration, which is what every compact has actually——

Senator **Wallop**. What if they sell it to a steam-generating plant in State for consumption? You see, I know it doesn't, but philosophically what we are talking about is the right of States to protect their water interests.

I guess what I am suggesting to you is that in each instance the loss to the States, the downstream States, is the same, whether or not it is sold for consumption, total consumption in the State of South Dakota for transmission by wire to some far distant places or by pipeline for the same kind of transportation except that I would suggest for the amount of coal that they get a better deal on the pipeline.

Dr. **Corker**. Gallon for gallon, the effect of a gallon of consumption is the same, but conceptually Iowa says that this leaves out our State law and it leaves out every downstream State law in favor of the law of the State from the point at which the diversion is made, and it is not a gallon-for-gallon matter if the State may use it not only within the State but anywhere where a pipeline may be constructed with eminent domain power to slurry coal.

Senator **Wallop**. I suggest that the effect on them is the same and the eminent domain power rests pretty much the same, with the transmission lines. Let me ask the panel a question which I believe is important, and that is the same question that Senator McClure asked Senator Baucus, and that is absent some action on the part of Congress and given the assumption that ETSI or any pipeline can have completed its route through private negotiations, what protection do the States or origin, water origin, have now with regard to water?

Dr. **Trelease**. I think none, sir. Montana has a law that says that the use of water for an interstate coal slurry pipeline is not a beneficial use.

Now obviously the purpose of that is to prevent any appropriation for it, and I think it is an obvious play on words to prevent the export of water, and I think that clearly under *Sporhase* that is completely invalid.

Now if this bill were passed and the legislative history were taken into account, or if the bill is amended to be specific about it, and if it goes as far as Mr. Widman said it could go, then I think that that Montana law would be validated, would be good.

Now Clyde thinks that it would not be wise to go that far, but I think it could be.

Mr. **Widman**. I agree with most of that. I won't say the upstream State has no protection, but the protection that it can get from the very uncertain guidance of *Sporhase* is so general and ambiguous that, in effect, it comes out the way Frank Trelease has just described.

Senator **Wallop**. It would have the protection of long litigation until a decision was handed down?

Mr. **Widman**. That's right.

Dr. **Corker**. The law as it now stands, Montana's law says that the use for slurry and coal is not a beneficial use of water. I think it is not clear whether that would stand up under *Sporhase* or not, although if I had to stand up and be counted I would say the court's holding in *Sporhase* that the surviving provisions of the Nebraska are not unconstitutional on their face leave Montana with a very good argument under the current law.

Under the law which would be enacted by S. 267 with its finding that the Congress of the United States declares that slurrying coal is a beneficial use, I think it would be more in jeopardy and indeed

I would think that the probability were it would be declared unconstitutional.

Senator **Wallop**. How can you say that? Let's make an assumption that we do the tightening that goes to the section 7, but even without that, do you hold as a matter of teaching or fact or whatever that the report language is of no consequence?

Dr. **Corker**. No. I agree with what Frank Trelease said, and that is that Frankfurter said we must never give points to the quip that we can use the language of the statute only when the legislative history is unclear. It is difficult for me to talk about the legislative history here because I have seen only the language of the bill, and I have grave doubts that a bill with two diametrically opposite purposes, that you can get into that bill protective language.

There is one other problem here. This bill addresses only the commerce clause. This bill addresses only the commerce clause. There are other portions of the Constitution, including the structural considerations. That is the phrase that Charles Black has taught us to use, those things that are so because they have to be so in the Federal Union.

In addition to the commerce clause I think there is a serious mistake to try to deal solely with commerce clause objections on the basis of the case that is as murky as any the court has ever decided. We don't know yet whether the Sporhases will be able to take one glass of water from their small well on their farm in Nebraska to their portion of their farm which is in Colorado.

Senator **Wallop**. I think you have to make the observation that with or without this, everybody's certainty has been clouded considerably, and there is but one thing of any validity and that is some sense of certainty.

I would hope that you would see fit to provide us with information that you think could provide some certainty in this area, given the uncertainties even without—and I am asking you based on your broad experience in water law—even without a slurry pipeline bill.

We westerners and I suspect we States very much need to to find the means by which we can add some certainty, and if you would comment on that absent the slurry pipeline legislation, I think it would be very helpful to the committee.

Thank you.

The **Chairman**. Thank you.

Senator Ford.

Senator **Ford**. Thank you, Mr. Chairman. I find myself completely amazed at the legal talent that we have in front of us and fearful of asking questions which might seem too simple for such learned minds. I need a lot of help and if you could come in with four-letter words I would appreciate that also.

Professor Trelease, on page 8 of your prepared statement you talk about public interest limitation that a State has had since 1890. They do make it clear that after economic, social, environmental analysis has been made and instate development plan, so forth and so forth, and you get into is this evenhandedness required by *Sporhase?* Will these stand up in the light of *Sporhase?* They certainly do not meet the strict test of health and safety imposed on El Paso, and I fear for them.

Are you telling us that all that is going to fall as a result of *Sporhase* and *El Paso?*

Dr. TRELEASE. It may. I think it very well may, that certainly if the *El Paso* approach is taken, that the court said only matters of health and safety would take the water out of the category of an economic good that is subject to the commerce clause, and therefore, I think that most of these conditions if litigated, as long as I can predict, I believe they would fail.

Senator FORD. Well, the law is really more uncertain today than it was before *Sporhase* and *El Paso, isn't it?*

Dr. TRELEASE. I think it is more certain that they are bad.

Senator FORD. More certain and they are bad?

Dr. TRELEASE. More certain that they are bad.

Senator FORD. I am interested in the argument here, well, let me ask you this. Is there any doubt in your mind if this bill is passed and becomes law whether or not it will not be settled in court?

Dr. TRELEASE. No, sir.

Senator FORD. OK. Anybody think it will not be settled in court?

The CHAIRMAN. It will go to court.

Senator FORD. I want to get the environmentalist especially. Don't you worry, Professor. You're going to get me in a minute.

Dr. CORKER. I have a doubt whether it will be settled in time to do any good, and that is until 10 or 20 or 30 years after which 10 or 20 or 30 years I think the judicial decision inevitably will be to uphold the status quo in terms of physical consequences.

Senator FORD. What does that mean?

Dr. CORKER. It will take a long time to get to court and if the project is operating and constructing and people are dependent on it, it is likely to be upheld at that time. Neither the Congress nor the courts are likely to intervene.

Mr. CLYDE. Mr. Chairman, I feel certain that a water right can be put together for a coal slurry pipeline by buying an existing right and changing the application. In the IPE powerplant that went into the driest part of Utah—about 45,000 acre feet of water; build a steam-generating plant. I think that can be done and a pipeline can be built, and I think if it is built and the law is not passed, that the State water law is a great deal more in jeopardy than it is if you pass this bill.

This bill protects the State allocation system, and I don't think there is any question at all but what Congress has the power to authorize States to put limitations on the export of water. There is no question. Congress can do it, and if the States do it without Congress approval, *Sporhase* and the *El Paso* case is going to put those limitations very much in jeopardy, but with congressional approval, a coal slurry pipeline can be authorized and a State could be authorized to put limitations on the export of water which would protect whatever State entries you want to provide for.

Senator FORD. Well, let me ask you this, Mr. Clyde. You were talking about was it the *Colorado* case where the court held they were entitled to the water and they were upstream, and even though they were not using it, it was theirs? And they could use it at some time and jeopardize the States below them.

Mr. CLYDE. They can use their equitable share. ETSI has made a contract with South Dakota that keeps South Dakota's share of the river for its priority. We didn't get anything. If we later have a compact that says look, South Dakota didn't have enough water to give you that 20,000 or 50,000 acre-feet, you are cutting into Iowa's share, it is void because the State of South Dakota cannot allocate Iowa's water.

It can allocate its own in interstate stream after you get the equitable apportionment, and I am sure it is also true before you get.

Senator FORD. What does that do to utilities take or pay at the other end?

Mr. CLYDE. About like the contract that they got up in the Pacific Southwest. It creates one heck of a problem. If the project is going under you have got a question of who you put the blame on or if you can pass it on to the customers or the shareholders take the loss.

Senator FORD. It's obvious the consumer will pay for it. He always has. We always make the consumer pay for it.

Now let me ask you another question. You seem to be knowledgeable and you have been to court and presented your position to the Supreme Court. Water in the pipeline becomes a very dangerous operation to me as it relates to the environment. If that pipeline should get all its water to the end of that pipeline and either sells or donates the water to an end user, does that eliminate the pipeline of any liability it might have as a result of that water?

Mr. CLYDE. I think not.

Senator FORD. That is what I tried to argue when I tried to get an amendment in this committee last time, and that the bill exonerated the pipeline, but you are telling me now it does not?

Mr. CLYDE. As I see it, you have to take the nature put on you, but you don't have to take the water officially brought to you. It's about like shoving a garden hose in the window of my car and turning it on. Nature wouldn't have done that to me and I can recover damage. If you take water out of a river, take it 50 miles and put it on land where it does damage where nature wouldn't have done it, I think there is liability.

Senator FORD. I thank you. You have been worth the trip here, Mr. Clyde.

Now since I have gotten to that point, Mr. Claflin, how about you? You be Tom and I'll be Wendell. You referred to Los Alamos National Laboratory and a report.

Do you have a copy of that report?

Dr. CLAFLIN. I don't have it with me, sir.

Senator FORD. Can you get a copy of that report?

Dr. CLAFLIN. Yes, indeed, I can.

Senator FORD. I sure would be happy to have one. Hasn't anybody seen that one, and I am very pleased that you were able to enlighten us. The authors of that report according to your statement confirmed the potentially serious risks that are associated with the release and discharge of coal slurry into the waste ponds, et cetera, is that correct?

Dr. CLAFLIN. That is correct, sir.

Senator FORD. In your statement on page 7 you talk about breakage, spills and other operating contingencies. You also talk about if you have a break, the pond that is available to take all the coal and the water and that sort of thing, if they don't have immediate sale of that, they have to dredge it and get rid of it and do something with it?

Dr. CLAFLIN. Presumably, yes, sir.

Senator FORD. That is correct. OK. What happens downstream then? We are talking about taking the water away from people downstream and the entitlements they might have.

What happens downstream from the break if you fail to plug large volumes of water to be injected into the ponds or that sort of thing?

Dr. CLAFLIN. Well, upstream from the break normally the pipe would be voided into a pond such that the material would not settle out in the pipeline.

Downstream, immediately downstream from the break or plug, fresh water is injected into the pipe to deliver the material to its destination.

Senator FORD. So the pipeline in addition to getting water at the far end will have to have contracts along the pipeline to acquire water in case they have a break, in order to inject fresh water into that because you have to plug beyond the break?

Dr. CLAFLIN. That's right. There would be a requirement for water along the length of the pipeline for breakage or contingency.

Senator FORD. So we are getting into the proposition here were State A may be at the beginning of the pipeline but State B and State C and State D down the line would be in the posture of contracting for water also to the pipeline?

Dr. CLAFLIN. Yes, sir.

Senator FORD. I guess I will ask the next group, Mr. Chairman, about the small operator here. We are talking basically about the environment with our panel here and water laws, and I am inclined to agree with my colleague from Montana, Senator Baucus, that we ought to get this in house.

Senator Johnston has said, he was a good fellow about putting connotations on bills. He called one a turkey not so long ago, and I think maybe we are fast plucking another one. The problems that I see with small operators and murkiness of the water law and the ability to charge $1,400, from $400 to $1,400 for an acre-foot of water, and it takes near 23,000 acres, it is just going beyond anything in reality here.

I am not talking about your position as it relates to water law. I am talking about our position of getting into turning this over to a few and making large ones take and pay. It just doesn't make sense.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Melcher.

Senator MELCHER. Thank you, Mr. Chairman. Professor Trelease, your testimony makes it clear that you do not believe that States own water I don't think they do, either. As a matter of fact, I don't believe anybody owns water. I believe you have the right to use water, and those rights are established. I don't think your testimony quarrels with that philosophy, does it?

Dr. TRELEASE. No. That is correct, sir.

Senator MELCHER. The distinction of having the right to use water must mean that someone regulates who has use of the water, for what period of time and in what quantity. I suspect that on balance here your statement argues that perhaps States are in the best position to regulate. Is that correct?

Dr. TRELEASE. I believe so, yes, sir.

Senator MELCHER. With regard to the Montana law which declares the use of water in coal slurry lines as not being a beneficial use, is it your interpretation that this statute refers to interstate coal slurry pipelines?

Dr. TRELEASE. Yes. It specifically says the use of water for the transport of coal outside of Montana is not a beneficial use. If you had a coal slurry pipeline from one point in Montana to another, that would be beneficial.

Senator MELCHER. If the statute were changed to say intra or inter, how do you think the *Sporhase* case would apply then?

Dr. TRELEASE. I think it would still be regarded under *Sporhase* as an impermissible restraint on commerce.

Senator MELCHER. In terms of the quantity of water to be used, is it your feeling that this should be left primarily to the States?

Dr. TRELEASE. They are well equipped to do it in the western States.

Senator MELCHER. In the case of competing interests, which is certainly true in all Western States, and perhaps throughout the country, do you feel that authority should rest with the States?

Dr. TRELEASE. That is where it is now, and I think properly so.

Senator MELCHER. Then what should be the provisions in this statute? A declaration?

Dr. TRELEASE. A declaration that State water law does control, and I think that the bill could be improved to remove all doubt by defining what you mean by State law to include possible restraints and conditions on the export of water from the State.

Senator MELCHER. What effect would that have on winners in subsequent cases that affect the quantification of Indian water law?

Dr. TRELEASE. Well, the Indian water laws are not affected by the State water laws, and I do not believe will be affected by this bill.

Senator MELCHER. Why would they not be affected if Indian tribes were engaged in providing water for coal slurry lines?

Dr. TRELEASE. Now if you mean that could the Indians themselves provide the water from their allotments, that I think will have to be answered by the Supreme Court. I don't know.

Senator MELCHER. That is why obviously it would have some effect on Indian tribes since this statute is primarily designed to accommodate the coal slurry interests that might want to move coal from Western States where there are Indian tribes located.

Dr. TRELEASE. Well, the bill does say that the Indian water rights are not to be affected. Now if the Indian water right includes rights to use the water for industrial purposes or includes the right to sell the water for industrial purposes and as to that I make no comment, I simply do not know, then it might be possible that a coal slurry pipeline would have an alternate source. They could either go to the State water officials and ask for a permit or they could go to the Indians and make a contract.

Senator **Wallop**. Would you just yield for half a second?

Senator **Melcher**. I would like to make one further point. Since all water in Montana or Wyoming would be affected by whatever rights Indian tribes have, does it not make logical sense that if we are trying to solve the use of water in coal slurry pipelines in this committee and in the Senate, then we have also to solve the Indian water rights issue?

Dr. **Trelease**. I do not know how the Congress could solve those problems, sir. The Indian water rights have been declared to exist by the Supreme Court of the United States, and I do not know whether they would be agreeable to have them defined or limited or controlled by the Congress. I do not know.

Senator **Wallop**. The point I was going to make, John, and I don't mean to interrupt you at all, but the fact is they would not get eminent domain under the terms of this bill if they were to use reserved water rights because it explicitly says that any water for eminent domain would be in payment pursuant to State water law.

Senator **Melcher**. I would just point out that even with a knowledgeable panel such as this, it is impossible to cover all of the questions concerning where the water comes from and who has jurisdiction over establishing under what conditions the water would be used because there are too many unknown quantities in this case.

Senator Wallop has pointed out that although an Indian tribe may not be directly affected, all tribes are indirectly affected when water is used in the Western States where the reservations for the Indian tribes exist. Importantly, some of the water has been already appropriated for their use.

I thank the Chairman, and I thank the panel.

The **Chairman**. Thank you, Senator Melcher. The suggestion has been made by a number of people both on this panel and elsewhere that States could settle the problems of apportionment by compact. If I read *Sporhase* correctly and if I understand the commerce clause at all, it does not necessarily confine the commerce clause application simply to the States that adjoin one another. Is that not correct?

Mr. **Widman**. That is correct.

The **Chairman**. And it does not necessarily confine the application of commerce laws to water simply to the States within a given hydrologic basin whether it be a surface basin or a subsurface aquifer, is that correct?

Mr. **Widman**. That is correct.

The **Chairman**. Any disagreement with that?

Dr. **Trelease**. No.

The **Chairman**. Then it would be almost impossible to identify in advance the States that might have a conflict of interest unless all of the contiguous 48 States were combined into one compact, is that not correct?

Mr. **Widman**. That is correct.

The **Chairman**. If that is correct, then it seems to me that the compact is a very difficult way to solve the multiplicity of questions that may arise with respect to the implications of the commerce clause application to the commercial availability or the nature of water as a property.

Dr. TRELEASE. If I might add, sir, I think it would complicate the situation very much even among the adjoining States. The aquifer which El Paso seeks in New Mexico is an interstate aquifer. It has got water on both sides of it, but if it were attempted to make a compact between New Mexico and Texas, I think that after the *El Paso* case practically all of New Mexico's trading stock, bargaining position, has been destroyed. They have nothing to sell.

The CHAIRMAN. Mr. Clyde, you made reference on the bottom of page 3 of your statement, next to the last sentence, starting the third line up, and I quote, "However, if a private appropriator has perfected a water right in accordance with State law, the right vests."

Now that should properly be read, should it not, in connection with the equitable apportionment?

Mr. CLYDE. It would have to be within that State equitable apportionment. That would be a part of the test of validity.

The CHAIRMAN. So it doesn't vest as in regard to another State's rights or the rights of an appropriator in another State if it contravenes equitable apportionment?

Mr. CLYDE. Each State can grant permits under its law.

The CHAIRMAN. Mr. Widman, on page 10 you touched on one matter that is of concern to me, and that is if we pass the statute the way the bill is before us today, with or without the report language that we used in the report filed last year, how broadly will the language of this legislation be interpreted? Will it affect more than just coal slurry pipelines?

Mr. WIDMAN. The comment on page 10 refers to section 5(a). The reference there is to an "interstate coal pipeline distribution system" which could refer to interstate pipelines other than those that are certified pursuant to this process. But I do not see anything here that would extend the reach of the "reconstitutionalization process" beyond coal slurry pipelines. There is a question of whether it refers to certified versus noncertified pipelines, but it does not go beyond coal slurry pipelines.

The CHAIRMAN. You don't think there is any likelihood that the language would be interpreted as an attempt by the Congress to affect the commerce clause except with respect to these specified pipelines?

Mr. WIDMAN. I think that is correct, and I am sure the report would underscore that as well.

The CHAIRMAN. Mr. Trelease?

Dr. TRELEASE. I would agree with that.

The CHAIRMAN. As you know, the Department of Justice has thrown some doubts on that because since we acted here, did we intend not to act elsewhere?

Mr. WIDMAN. Well, it seems to me that in your findings section, for example, you address the fact that this is a problem that is coming up now. It is a problem presented to you at this time. It seems to me that you should be able to deal with that issue in your report by making it clear that you are responding to this urgent limited priority problem and you need not tackle the whole area of western water law.

The **Chairman**. Do any of the others have concerns that the issues raised by the Department of Justice may have application in a broader range of subjects than just slurry pipelines?

Mr. **Clyde**. I don't. I think the argument that Your Honor just stated was raised by a dissenting justice in Cooley, rejected by the majority. He argued that having taken action here, it had a negative implication elsewhere.

Dr. **Trelease**. I think this is clearly a pipeline bill, sir.

Dr. **Corker**. I would think that those are possible constructions, but I am glad I don't have to make betting odds as to which is the more likely. I think there is a basic incongruity about this bill which announces that it is a pipeline bill and intended to deal broadly with the *Sporhase* problem which is a ground water problem involving water for one farm that lies across the State line.

The **Chairman**. On the bottom of page 6, Mr. Corker, of your statement you say that section 8 of the Reclamation Act of 1902, those words are applicable to every Federal reclamation project. However, this cannot be enforced by a State engineer without aid of a compact or a Federal statute.

Should that be read to mean you cannot be forced as against appropriators in other States?

Dr. **Corker**. I think once water leaves the State line, I think the State——

The **Chairman**. You are talking of the interstate problem rather than enforcibility within a given State?

Dr. **Corker**. The State engineer has authority to prevent wasted water, but his authority to do so with any specific device is limited to what he can do within his State.

The **Chairman**. So your statement is that the 1902 Reclamation Act does not vest him with power to do outside of his own State anything he couldn't do, otherwise do?

Dr. **Corker**. That is exactly right, and there is protective language in section 8 actually that was put in there to recognize that the Kansas against Colorado was in litigation and nothing shall affect Kansas against Colorado.

The **Chairman**. Mr. Corker, in spite of your caution, and you have been very cautious this morning about trying to predict what will happen under this bill or under existing statute, the bottom of page 9 and the top of page 10 you indicate that you think that Sporhase will never get any of that water out of their Nebraska well up to the Colorado land.

Dr. **Corker**. Yes, sir. There are three provisions which expressly are held to be not unconstitutional, and the bottom line in the majority opinion was, ascends back to find that those are severable from the language held unconstitutional, and the view I expressed indeed is the same view that the final footnote in Justice Renquist's dissent expresses, and that is that he cannot see, the dissenters cannot see how the Sporhases can export water when the fact is—and this is in the amicus brief that was filed, but it was not judicially recognizable and was not recognized—the fact is the Sporhases had been turned down in 1977 by the State of Colorado.

The State of Colorado Attorney General told the court this in an amicus brief. They had been turned down because there was not water available from that aquifer to appropriate in Colorado.

The **Chairman**. Are you suggesting that the *Sporhase* case leaves the States enough latitude that in every instance they will be able to prohibit export of water?

Dr. **Corker**. I think that that is not an unlikely possibility, and that would be a very happy possibility—not in every instance. I don't think they can do so, but the overbroad language and the court's opinion makes this clear. It says in every instance and no matter what, water may not be exported or water may not be exported to a State that doesn't allow reciprocity. Now you have got to look at the State has to have machinery in which the State looks at that on an individual basis, and I think that probably will survive.

The **Chairman**. If that is the case, if the courts are going to be, and the States are going to be ingenious enough to find a way to meet the qualifications required by the *Sporhase* case and other cases, in every instance they will be able to prevent export where they wish to prevent export, then what is the harm of us simply saying so, so they don't have to go to court and spend all of their substance for the next 30 years?

Dr. **Corker**. The best wasy to do that would be to reverse *Sporhase*, referring expressly by citation to *Sporhase* against *Nebraska*, and to provide that the part of the *Sporhase* opinion which holds unconstitutional that reciprocity provision is overruled.

Now that is not abrogating the commerce clause because Congress in the next Congress or the later session of this Congress or tomorrow——

The **Chairman**. Would that be within the powers of the Congress to do, to specifically do that, or would that contravene the provision of the Constitution as interpreted by the Supreme Court?

Dr. **Corker**. No. That would be specifically within your powers ever since Wheeling Bridgeway before the Civil War reversed a decision of the Supreme Court under the commerce clause where there was a conflict.

The **Chairman**. That is a tempting notion. Mr. Trelease, would you agree that we can do it with that kind of language?

Dr. **Trelease**. If you simply reverse *Sporhase* that only deals with the reciprocity provision. Now the Supreme Court couldn't find any sense in the reciprocity agreement, but it seems to me that there is a very good, sensible approach to it that we will let you export our water as long as it is not a one-way street, and that seems quite reasonable to me, and it would be perfectly permissible for Congress to say it looks reasonable to Congress as well, but whether that really answers all of the other problems about the Montana statute and about the particular terms, I don't think it would.

The **Chairman**. Mr. Clyde.

Mr. **Clyde**. I think that it is preferable to do this on a case-by-case method rather than an omnibus-type bill trying to handle it, all the issues, for a whole lot of reasons that I put in my paper.

Second, I agree with Mr. Corker that what you can do to cure a commerce problem doesn't mean it won't run afoul of some other clause. In the *Boston* case I alluded to 2 weeks ago, the Supreme Court did not address the privileges and immunities clause because it wasn't raised, but the same day they heard a certain identical case from New Jersey that did raise it, indicating that it cleared the commerce thing, all right, but may run afoul of the privilege of immunity, and I think if you begin to adopt statutes that the State of Wyoming can come into the State of Utah, you have got privileges and immunity questions, too, whereas if you provide in a coal slurry pipeline bill that Congress grants the State the power to restrict exports to protect the State's economic interest in the water as reasonably necessary to do it, then you will handle this problem all right.

Whether the Indians can export and some of these other questions are much tougher and bigger problems, and to try to handle all of them in an omnibus bill I think would be a mistake.

The CHAIRMAN. Senator Warner.

Senator WARNER. I pass, Mr. Chairman.

The CHAIRMAN. Are there others who wish to ask further questions?

If not, we will then at this time recess until the hour of 2 o'clock, and I want to thank all of the gentlemen for your testimony this morning. Obviously the committee has great interest in your reports.

[Whereupon, at 12:55 p.m., the hearing was recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. This committee will come to order. We will next here from Mr. Paul Doran, President, Energy Transportation Systems. Mr. Doran.

Mr. DORAN. Thank you, Mr. Chairman. Members of the committee, my prepared statement is somewhat lengthy. It is in a good deal of detail.

The CHAIRMAN. We will place that in the record, and if you would proceed to summarize?

Mr. DORAN. I would.

STATEMENT OF PAUL DORAN, PRESIDENT, ETSI PIPELINE PROJECT, HOUSTON, TEX., ACCOMPANIED BY DR. DAVID H. FRANCE, TEXAS EASTERN CORP.

Mr. DORAN. Thank you very much, Mr. Chairman. I have summarized that testimony, and in that summary I have not in detail treated the environmental aspects of our project, and for that reason I have taken the liberty of bringing Dr. David France with me who will be prepared to answer any technical environmental questions that the committee will choose to ask.

I also, Mr. Chairman, request that a written response that we have made to the written testimony of Dr. Claflin be accepted into the record, if you please.

The Chairman. How voluminous is the response?

Mr. DORAN. It is about seven or eight pages.

The Chairman. It will be placed in the record as part of your statement.

Mr. DORAN. Thank you, sir. Mr. Chairman, and members of the committee, my name is Paul Doran, and I am president of the

ETSI pipeline project. The ETSI project is the most advanced interstate coal slurry project presently being developed in the Nation.

Since 1973, we have expended substantial resources toward the construction and operation of a major interstate pipeline to move Powder River basin coal from Wyoming to utility plants and other industrial facilities in the Midsouth.

My purpose in appearing before this committee today is to confirm ETSI's support of Senate bill 267, and to firmly establish our urgent need for this legislation. We need both the Federal and the eminent domain authority contained in the legislation, and the legal framework the bill establishes in which our pipeline company can secure long-term water supplies for our system.

The ETSI pipeline project is a joint venture of Texas Eastern Corp. and InterNorth, Inc., Bechtel, Inc., and Kansas-Nebraska Natural Gas Co. The ETSI pipeline system consists of our major parts—one, a water source; two, coal preparation plants; three, an underground pipeline system; and four, dewatering facilities.

Our pipeline system will carry approximately 30 million tons per year of low sulfur coal from the Wyoming Powder River coalfield to the Midsouth. Construction is currently scheduled to begin in 1984 with operations starting in 1986.

Let me briefly explain the operation of the pipeline. Three coal slurry preparation plants will receive coal from six mines in the Powder River basin of northwestern Wyoming. Once ready for transport, the coal slurry will be transmitted through 71 miles of gathering pipelines to the main slurry pipeline which will extend underground for approximately 1,400 miles to the Midsouth.

Construction of the ETSI pipeline will ultimately require over 500 State and Federal permits, many of which we have already obtained. Every aspect of ETSI's operation between the coal receiving point and the coal delivery point will be the responsibility of ETSI. Facilities between these two points, including the water disposal and water treatment facilities, will be owned and operated by ETSI. The capital cost of the project is estimated at approximately $3.8 billion, in escalated dollars, and ETSI will be financed entirely by private capital with no Government funding or guarantees.

To date, the ETSI partners have spent over $100 million developing our project. Mr. Chairman, at this point I would like to discuss briefly three aspects of our project—one, our water arrangement; two, our window program which was used to get right-of-way across railroad property in the absence of Federal eminent domain authority; and three, our experience under Oklahoma State eminent domain law.

As part of our water development program, ETSI considered the physical and legal availability of several water sources. After extensive analysis, two sources of water became prime candidates for our supply—the Oahe Reservoir and the Madison Limestone Formation.

In 1971—I beg your pardon—in 1981, Gov. William Janklow responded favorably to a request from the ETSI project to make the Oahe Reservoir rather than the Madison Formation the primary supply. As part of a 1981 special session of the South Dakota Legislature, enabling legislation was adopted which created a special class of water rights for energy industry projects. Authority was given to the South Dakota Conservancy District to enter into contracts for the assignment of water rights to energy industry users.

On December 23, 1981, after 3 months of intense negotiations between ETSI executives, the Governor of South Dakota, and his secretary of water and natural resources, an agreement was executed. The contract provides that ETSI will receive assignment of a South Dakota water right starting at 20,000 acre-feet per year up to 50,000 acre-feet per year, and will have 10 years to place the full appropriation to use.

As consideration for the water assignment, ETSI will pay an annual water use fee of $9 million to be escalated according to changes in the gross national product. These payments are earmarked for State water development efforts. ETSI has agreed to provide pipeline capacity in the water line free of charge, to deliver water to western South Dakota communities and rural water systems suffering from severe drought conditions and chronic water problems.

ETSI will bear the cost of constructing the costly pressure reduction system at the points where the domestic systems will tie into ETSI's line, and provide technical advisory service to communities in western South Dakota.

It is important to know that the total amount of water transferred to ETSI is approximately 10 percent of the annual net evaporation from Lake Tahoe. I speak from personal experience, Mr. Chairman, when I tell you and members of this committee that I have no doubt of the ability of interstate coal pipeline projects to acquire water in a manner that is in the public interest, consistent with the laws of the authorizing State, and acceptable to the pipelines' commercial interests.

The ETSI project has always had the highest regard for the authority of individual States with respect to the allocation of their waters, and firmly believes that this is an area that must be left to the discretion of the individual States as Senate bill 267 so provides.

Let me now describe ETSI's experience in developing an interstate pipeline in the absence of Federal eminent domain authority.

ETSI's right-of-way acquisition for approximately 1,400 miles of coal pipeline began in 1975. ETSI officials contacted various railroads involved in an attempt to negotiate easements or licenses to cross under these tracks. It is usually a routine matter for railroads to issue permits or licenses for other pipeline crossings once it can be shown there will be no interference with the railroad operation, but ETSI's files show that we were refused crossing permits in every instance.

ETSI initiated its window program for obtaining rights-of-way from the railroads. I use the term "window" to describe the opening through which our coal pipeline crosses under railroad rights-of-way. Extensive title searches were made of the railroad land grants to identify surface right easements.

The CHAIRMAN. I am going to have to ask you to suspend for a few minutes while we respond to a rollcall on the floor of the Senate.

The committee will stand in recess.

[Recess.]

Senator **Johnston** [presiding]. Mr. Doran, if you would go ahead and continue, please?

Mr. **Doran**. Thank you, Senator. I was explaining the ETSI window program for the acquisition of rights-of-way across properties that the railroad had acquired by Eastern.

ETSI began an extensive process of legal, challenging the authority of these railroads to deny our crossing requests over ETSI's route. It was necessary to institute 65 individual lawsuits against the railroads to establish ETSI's rights. ETSI's window program was completely successful at the trial court level as well as all appellate review. In one of the major court cases which ETSI filed against the railroad, the presiding judge noted in his opinion that while the railroad possessed certain rights by virtue of track and facilities, the court could not conclude that Congress created a marginal line in the form of a limited easement through which the railroads' commercial rivals may not pass.

Although this costly and time-consuming litigation enabled ETSI to obtain certain rights-of-way to cross under rail lines, we had to realine our pipeline so that it would cross at the windows opened by the court. This legal process added at least an additional 2 years to the preconstruction stage, substantial legal fees, and additional millions of dollars to our project construction costs.

The fundamental reason in requiring interstate pipelines to obtain eminent domain authority on an individual State basis is easily illustrated by ETSI's recent experience in Oklahoma, one of several States through which our pipeline will cross. Oklahoma is important to us because we must deliver coal to specific locations in Oklahoma, thus limiting our ability to reroute our pipeline around landowners that refuse rights-of-way to our project.

In 1977 the Oklahoma Legislature adopted legislation creating the right of eminent domain for coal pipelines. The Oklahoma law established an elaborate licensing process for eminent domain authority under the jurisdiction of the Oklahoma Corporation Commission. The Oklahoma Railway Committee and the United Transportation Union intervened in opposition to the license and on six occasions moved for continuance of the proceeding. The Oklahoma Railway Committee is made up of the Burlington Northern, Santa Fe, Missouri Pacific, Katy, and Kansas City Southern Railroads. After 18 months of procedural delays by the Oklahoma Railway Committee, a hearing was held before the Oklahoma Corporation Commission on February 8, 1983.

We had support in this hearing from four intervening Oklahoma utilities—Oklahoma Gas and Electric, Public Service Company of Oklahoma, Grand River Dam Authority, and Western Farmers Electric Cooperative. The Plumber and Pipefitter's Local Union 798, AFL-CIO, also supported our position. Proposed findings and orders were submitted to the Commission on February 25, 1983, and the matter is still pending.

ETSI is confident of favorable action by the Oklahoma Corporation Commission now that the case has been heard and proposed findings and orders submitted. However, the railroad opposition has vowed to appeal a favorable decision to the Oklahoma Supreme Court. The present docket before the State supreme court leads

ETSI's legal advisers to believe it will take up to 1½ years for the matter to be disposed of by the court.

In South Dakota, as in Oklahoma, ETSI has been hampered by the dilatory practices of the railroads. ETSI's water source in South Dakota comes from the Oahe Reservoir. The route of the West River aqueduct traverses land held by over 150 individual landowners. One of these, the Chicago and Northwestern Railroad, has a right-of-way that intersects with the proposed route of the West River aqueduct. The railroad has firmly refused to grant a crossing permit to the water pipeline for the one crossing necessary in South Dakota.

Governor Janklow on ETSI's behalf appealed to the chief executive officer of the CM&W to permit the pipeline crossing, but to no avail. During the current session of the South Dakota Legislature proposed legislation providing a quick take provision to acquire rights-of-way from all landowners along the proposed route of the West River aqueduct was defeated by the South Dakota house. However, on March 4, 1983, the legislature did enact legislation providing this quick take remedy against other entities operating in South Dakota which already possessed the power to use eminent domain authority, specifically railroads and utilities.

The CM&W has already indicated that it will challenge the constitutionality of this legislation when it becomes law.

Mr. Chairman, we don't need eminent domain authority only to cross railroad property. In the vast majority of these cases we have been and will be successful in negotiating rights-of-way from nonrailroad landowners. However, one or two landowners who are strategically located did refuse to grant rights-of-way to our pipeline. A small group of landowners in Nebraska denied us rights-of-way which forced us to reroute our pipeline through Colorado at an added expense of over $50 million.

The only condemnation we pursued in Wyoming were against private landowners under State law. My experience with other pipelines, all of which had eminent domain authority, proved that any strategically located landowner could prevent a pipeline that does not have access to eminent domain authority.

Mr. Chairman, I believe it should be evident to you and the members of this committee that ETSI's substantial experience with State eminent domain authority demonstrates the critical need for Federal eminent domain. In our judgment, there is no alternative means of providing a consistent, certain, and rational basis for the development of major interstate coal pipeline projects.

In summary, Mr. Chairman and members of this committee, the ETSI pipeline project has made substantial progress toward the development of our pipeline system. To assure completion of our project, we clearly need enactment of Senate bill 267. Enactment of Senate bill 267 will allow us an opportunity to compete in the free market and that is all we are asking.

I thank you very much, and I would be pleased to answer any questions you may have with respect to our testimony.

[The prepared statement of Mr. Doran follows:]

Prepared Statement of Paul Doran, President, ETSI Pipeline Project, Houston, Tex.

INTRODUCTION

Mr. Chairman and Members of the Committee, my name is Paul Doran and I am President of the ETSI Pipeline Project. The ETSI Project is the most advanced interstate coal slurry project presently being developed in the nation. Since 1973, we have expended substantial resources toward the construction and operation of a major interstate pipeline to move Powder River Basin coal from Wyoming to utility plants and other industrial facilities in the midsouth.

My purpose in appearing before this Committee today is to confirm ETSI's support of S. 267, and to firmly establish our urgent need for this legislation. We need both the Federal eminent domain authority contained in the legislation and the legal framework the bill establishes in which our pipeline company can secure adequate, long-term water supplies for our systems.

Later in my statement, I will describe on a state-by-state basis the difficulties ETSI has confronted, and will continue to confront, in acquiring rights-of-way for our pipeline in the absence of Federal eminent domain provisions. Our experience includes over 65 costly, delay producing, lawsuits ETSI has been required to file, and ultimately win, in order to cross railroad rights-of-way. I know that it is not news to Members of this Committee that only 12 states have passed laws specifically granting eminent domain for coal slurry pipelines, and that continual strong railroad opposition has defeated many recent attempts to increase that number. Even among those states which have such laws, included are quite onerous conditions inspired by the railroads. The ETSI Project believes that Federal eminent domain legislation is the only real solution to the development of a much-needed and viable coal slurry industry.

Enactment of S. 267 is also required to establish a legal framework for obtaining a water source. Many of you who are familiar with our project know that ETSI has entered into an agreement with the State of South Dakota to obtain water from the Oahe Reservoir for our pipeline. However, the recent Sporhase and El Paso decisions have created some concern as to the ability of States to enforce the conditions placed on the use of state water in interstate coal pipelines by such an agreement once that water begins to move in interstate commerce. The enactment of S. 267 is necessary to assure that states can enforce those conditions, and is vital to the ultimate success not only of the ETSI project but also of similar interstate projects. Passage of this legislation will leave no doubt as to the ability of interstate coal pipelines to acquire water in a manner that is in the public interest, totally consistent with state water laws, and compatible with the commercial interest of pipeline developers.

After a brief description of the ETSI Project I will outline for the Committee the following:

(1) Federal, state and local permits required for completion of our project;

(2) details of the agreement between ETSI and the State of South Dakota to secure our water source;

(3) the environmental soundness of the project; and

(4) ETSI's experience in developing an interstate coal pipeline in the absence of Federal eminent domain authority.

OVERVIEW OF THE ETSI PIPELINE PROJECT

The ETSI Pipeline Project is a joint venture of Texas Eastern Corporation (managing partner), InterNorth, Inc., Bechtel Group, Inc., and Kansas-Nebraska Natural Gas Company. The ETSI pipeline system consists of four major parts: (1) a water source; (2) coal preparation plants; (3) underground pipelines with pumping stations spaced every 80 to 100 miles apart; and (4) dewatering facilities. Our pipeline system will carry approximately 30 million tons per year of low sulfur coal from the Wyoming Powder River Basin coal fields to the midsouth. Construction is currently scheduled to begin in 1984 with operations starting in 1986.

Let me briefly explain the operation of the pipeline. Three coal slurry preparation plants will receive coal from six mines in the Powder River Basin of northwestern Wyoming. At these plants, the coal will be crushed and mixed with water to form a slurry for transport by pipeline. The mixture will be approximately half water and half coal.

Approximately 20,000 acre-feet per year of water will be required for the transportation of the coal. Water for the ETSI system will come from the Oahe Reservoir on the Missouri River under an agreement with the State of South Dakota. The water will be pumped from the reservoir to these slurry preparation plants in the Wyoming coal fields through a 270-mile underground pipeline, called the West River Aqueduct, to be built and operated by ETSI.

Once ready for transport, the coal slurry will be transmitted through 71 miles of gathering pipelines to the main slurry pipeline, which will extend underground approximately 1400 miles to the Midsouth. At dewatering facilities at the end of the main pipeline, coal slurry will be dewatered. At the respective delivery sites, the coal will be either stored or burned by utility generating plants and industrial faciltiies. Every aspect of ETSI's operation between the coal receiving point and the coal delivery point will be the responsibility of ETSI. Facilities between these two points, including the water disposal and water treatment facilities, will be owned and operated by ETSI.

Considerable investment, planning, and experience have gone into the ETSI Pipeline Project. From 1973 to 1979, the

ETSI partners spent $24 million to study the project's feasibility. Based on positive findings, the partners budgeted an additional $81 million in 1979 to proceed with the two-year-preconstruction phase. ETSI also spent over $15 million to build and operate a coal evaluation plant at the White Bluff generating station near Little Rock, Arkansas. This facility evaluated various Wyoming coals in the slurry process and tested their compatibility with the system's major equipment components. The plant clearly demonstrated that the water removed from the slurry will meet all Federal and state water quality standards.

Capital cost of the project is estimated at approximately $3.8 billion in escalated dollars and ETSI will be financed entirely by private capital with no government funding or guarantees.

KEY FACTORS IN THE DEVELOPMENT OF THE ETSI PROJECT

Three important aspects of the ETSI coal pipeline project are (1) the state and Federal permits required, (2) the need for an adequate water supply and (3) our concern for the environment.

A. STATE AND FEDERAL PERMITS

Construction of the ETSI pipeline will ultimately require over 500 state and Federal permits. The majority of these are non-environmental, routine pipeline construction permits now being obtained by our Right of Way Division in

Tulsa. All construction permits have been obtained for the states of Colorado, Kansas and Oklahoma. Exhibit I details the status of our construction permit acquisition program.

Major environmental permits required for the ETSI project include four air quality permits for the coal preparation plants in Wyoming. Three of these have been acquired and application for the fourth is being prepared. Another five air quality permits are required for the dewatering plants. Three of these have been obtained. The dewatering plants also require twelve water discharge permits, six Federal and six state. The six state permits, three from Oklahoma and three from Arkansas, have been obtained. The six Federal permits are still pending, but approval is expected later this month.

In addition to the various environmental permits, a host of Federal compliance actions are required prior to receiving a notice to proceed from the U.S. Bureau of Land Management. These include twenty-one actions to comply with Federal regulations on threatened and endangered species, and forty-five actions to comply with Federal regulations on cultural resources surveys. We have received 100% clearance for our main pipeline with respect to endangered species requirements. Compliance with the cultural resources survey requirements is about 35% complete.

As you can see, we are diligently pursuing the environmental permitting connected with the ETSI coal pipeline project. I believe it is an indication of the environmental soundness of state-of-the-art coal slurry pipeline technology, and of our project in particular, that none of the environmental permits we have applied for has been denied.

B. ETSI WATER PROGRAM

As part of our water development program, ETSI considered the physical and legal availability of several water sources. This review was guided by a management determination that our project would not compete with agriculture for the scarce surface water available within the Powder River Basin. Primary emphasis was given to the development of previously underdeveloped water sources. After extensive analysis, two sources of water became prime candidates for our supply -- the Oahe Reservoir and the Madison Limestone Formation.

Initially, the Madison Formation was planned to be the primary water source, with the Oahe Reservoir serving as a backup. For reasons that I will outline for you, the Oahe is now planned to be ETSI's primary source. As early as 1974, ETSI began working with the State of South Dakota and Federal agencies to secure the use of Oahe Reservoir water. Although the South Dakota Legislature did approve such a proposal in 1977, final executive approval was withheld. This apparent setback was dramatically reversed in 1981 when Governor William Janklow responded favorably to a request from the ETSI Project to make Oahe Reservoir, rather than the Madison Formation, the primary supply. Exhibit II outlines in more detail ETSI's water agreement with the State of South Dakota.

As part of a 1981 special session of the South Dakota Legislature, enabling legislation was adopted which created a special class of water rights for energy industry projects. Authority was given to the South Dakota Conservancy District to enter into contracts for the assignemnt of water rights to energy industry users.

On December 23, 1981, after three months of intense negotiations between ETSI executives, the Governor of South Dakota and his Secretary of the Water and Natural Resources Board, an agreement was executed. The contract provides that ETSI will receive assignments of a South Dakota water right, starting at 20,000 acre-feet per year up to 50,000 acre-feet per year and will have ten years to place the full appropriation to use.

As consideration for the water right assignment, ETSI will pay an annual water use fee of $9 million to be escalated according to changes in the Gross National Product. These payments are earmarked for state water development efforts.

ETSI has agreed to provide pipeline capacity in its waterline, free of charge, to deliver water to western South Dakota communities and rural water systems suffering from severe drought conditions and chronic water quality problems. ETSI will bear the cost of constructing the costly pressure reduction systems at the points where the domestic systems will tie into ETSI's line, and provide technical advisory service to communities in western South Dakota.

The U.S. Corps of Engineers has issued construction permits for the location of intake facilities at the reservoir. As part of this decision, an assessment of the impact of these structures was conducted which concluded that no significant impact from the ETSI withdrawals would occur to municipal and industrial water users, recreation, fish and wildlife, and natural heritage values. The final EIS prepared by the U.S. Bureau of Land Management on the ETSI Project found that the "widest range of beneficial uses would be obtained by the use of Oahe" and that this alternative "would not affect the use of the environment by future generations." It is important to note that the total amount of water transferred to ETSI is approximately ten percent of the annual net evaporation from Lake Oahe.

I speak from personal experience, Mr. Chairman, when I tell you and Members of this Committee that I have no doubt of the ability of interstate coal pipeline projects to acquire water in a manner that is in the public interest, consistent with the laws of the authorizing state, and acceptable to the pipeline's commercial interests. The ETSI Project has always had the highest regard for the authority of individual states with respect to the allocation of their waters and firmly believes that this is an area that must be left to the discretion of the individual states as S. 267 so provides.

C. ENVIRONMENTAL PROTECTION

Mr. Chairman, studies funded by industry and regulatory agencies alike provide overwhelming evidence that:

- Coal slurry pipelines have environmental advantages over other methods for transporting coal.
- Coal slurry is not a hazardous material and its transportation by pipeline does not constitute a threat to public safety.

Pipelines are buried and do not interfere with surface activities. Shipment of coal by unit train, on the other hand, poses hazards of derailment and road crossing accidents. Coal slurry pipelines eliminate noise and dust problems. By contrast, during the movement of one 100-car unit train from Wyoming to Arkansas, approximately 10 tons of coal dust is blown into the atmosphere and the surrounding countryside and noise levels approach 100 decibels.

Specifically, Mr. Chairman, I would like to address two questions which have been raised--coal slurry pipeline ruptures and the treatment and disposal of discharge waters from coal slurry pipelines. Detailed technical information in support of my statement is contained in Exhibit III.

1. Pipeline Spills

The first coal slurry pipeline, the Eastlake Pipeline, operated in Ohio without incident from 1957 to 1963. The Black Mesa Pipeline in Arizona (which serves a powerplant in Nevada) has been operational since 1970 and has experienced only two interruptions of service. In 1977, the operator of the Mohave Generating Station, facing an emergency at the generating station, closed the pipeline terminal valve without informing the other pipeline operators. The line ruptured in two places, spilling several hundred tons of coal onto the ground. The other interruption took place in 1979 and was caused by an undetected construction flaw which caused a minor leak of 200 tons. The spilled coal was not removed in either case because environmental authorities for the State of Arizona and U.S. Department of the Interior Bureau of Land Management determined that to do so would have disturbed the environment more than leaving it in place and that no damage had been done to game, fish or vegetation. After less than a year, the dried coal slurry had been dispersed by rainstorms and winds and no evidence of a spill remained.

Based on pipeline industry experience, the frequency of ruptures and associated spills can be reduced to a minimum with adequate design and operating considerations such as pressure alarms, automatic valve systems, emergency slurry holding tanks, and heavier pipewall thickness -- all of which will be incorporated in the ETSI system.

2. Discharged Water Quality

In response to concerns related to the disposal of waters from dewatering facilities, I submit for the record recent technical information which demonstrates that coal slurry pipelines can and do meet standards set for water discharges by Federal, state and local environmental agencies.

The slurry transport industry's ability to manage water discharges in a safe and environmentally sound manner is based on years of operating experience gained from commercial dewatering plants at the Eastlake Pipeline and the Mohave Generating Station in Nevada. Waters from the Eastlake Pipeline were discharged into Lake Erie with total suspended solid concentrations of only 5 to 10 parts per million. Discharge waters at the terminus of the Black Mesa Pipeline are cleaned by settling and flocculation and are of reusable quality. Approximately 10% of the power station's cooling water makeup is provided by the dewatering plant which would otherwise be extracted from the Colorado River. The discharge water system at Mohave removes all but 20 parts per million of the suspended solids in the water. This low level would be suitable for most rivers and streams in this country; however, a treaty with Mexico requires that no water be discharged into the Colorado River.

In addition, ETSI has performed extensive simultation tests using representative samples of coal and water to characterize discharge water quality. To supplement these tests with practical experience, ETSI constructed a Coal Evaluation Plant at White Bluff, Arkansas to study and test full-scale equipment, operation, and quality control associated with coal slurry systems. Results clearly demonstrated our ability to fully comply with Federal and State water quality standards.

Water quality information from simultation tests and from the ETSI Coal Evaluation Plant were used in formal permit applicatioins to environmental agencies for the discharge of water in Arkansas and Oklahoma. State water quality agencies have recently issued discharge permits for facilities at Independence, White Bluff and Cypress Bend in Arkansas, as well as Sooner, Pryor and Muskogee in Oklahoma. These states have certified ETSI's ability to meet state stream standards to the U.S. Environmental Protection Agency (EPA). After the necessary period for public review and comment, EPA determined that permits under the National Pollution Discharge Elimination System (NPDES) for the above facilities can be issued. ETSI expects to have these NPDES permits approved and in hand by the end of this month.

Finally, it should be stated that water discharge and other environmental issues were addressed in the Environmental Impact Statement (EIS) issued by the U.S. Bureau of Land Manangement for the ETSI Pipeline Project in July 1981. No adverse impacts on vegetation or wildlife were reported.

NEED FOR FEDERAL EMINENT DOMAIN

In addition to the numerous Federal, state, and local permits that must be obtained, there are two major objectives to achieve before any interstate coal pipeline project can be constructed. First, rights-of-way must be obtained from the owners of land across which the pipelines will be built. Second, rights must be secured to provide sufficient long-term supplies of water.

I have already detailed the permits and the water source agreement for the ETSI Project. Let me now describe ETSI's experience in developing an interstate pipeline in the absence of Federal eminent domain authority. As I mentioned, few states have granted eminent domain to coal pipelines while both oil and gas pipelines have this benefit in many states. Interstate gas pipelines were bestowed such authority by the Congress in the Natural Gas Act of 1938.

ETSI's right-of-way acquisition for the approximately 1400 mile coal pipeline began in 1975. ETSI found the greatest difficulty in securing permission to cross numerous east-west railroad routes intersecting with our pipeline routing. ETSI officials contacted various railroads involved in an attempt to negotiate easements or licenses to cross under these tracks. It is usually a routine matter for railroads to issue permits or licenses for other pipeline crossings once it can be shown there will be no interference with the railroad operation.

But, ETSI files show that we were refused crossing permits in every instance.

Also, we were informed by Federal officials that action would not be undertaken for preparation of an environmental impact statement until ETSI could demonstrate that railway crossings could be secured. This added further to the lengthy schedule normally required under the National Environment Policy Act to establish the environmentally-sound manner in which the system would be built and operated. (As I pointed out, however, ETSI's final Environmental Impact Statement issued by the U.S. Bureau of Land Management in July 1981, found ETSI's coal slurry pipeline to be an environmentally-sound way to transport coal.)

In view of these circumstances, ETSI initiated its "window program" for obtaining rights-of-way from the railroads. I use the term "window" to describe the opening through which our coal pipeline crosses under railroad rights-of-way. Extensive title searches were made of the railroad land grants to identify surface rights easements that lay across our proposed route. ETSI then began an extensive process of legally challenging the authority of the railroads to deny our crossing requests. Over ETSI's route, it was necessary to institute 65 individual lawsuits against the railroads to establish ETSI's rights.1/ ETSI's "window program" was completely successful at

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1/ In one of the major court cases which ETSI filed against a railroad, the presiding judge noted in his opinion that while

[footnote continued next page]

the trial court level as well as all appellate reviews. Exhibit IV shows the number of "windows" required in each state along ETSI's route, as well as the means by which individual railroads originally acquired title to the properties to be crossed by the ETSI Pipeline.

Although this costly and time-consuming litigation enabled ETSI to obtain certain rights-of-way to cross under rail lines, we had to realign our pipeline so that it would cross at the "windows" opened by the courts. This legal process added at least an additional two years to the preconstruction stage, substantial legal fees and additional millions of dollars to our projected construction costs.

ETSI'S EXPERIENCE WITH STATE EMINENT DOMAIN LAWS

The fundamental flaw in requiring interstate coal pipelines to obtain eminent domain authority on an individual state basis is easily illustrated by ETSI's recent experience in Oklahoma, one of several states through which our pipeline will cross.

In 1977, the Oklahoma Legislature, adopted legislation creating the right of eminent domain for coal pipelines. The

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[footnote continued from previous page]

the railroad possessed certain rights by virtue of track and facilities, the court could not "conclude that Congress created a 'Maginot Line' in the form of a limited easement, through which the railroad's commercial rivals may not pass" (Energy Transp. Systems, Inc v. U. Pac. R. Co., 435 F. Supp. 313 at 318 (D. Wy.), aff'd 606 F.2d 934 (10th Cir. 1979).

Oklahoma law established an elaborate licensing process for eminent domain authority under the jurisdiction of the Oklahoma Corporation Commission. The Oklahoma Railway Committee and the United Transportation Union intervened in opposition to the license, and on six occasions moved for continuance of the proceeding. The Oklahoma Railway Committee (ORC) is made up of the Burlington Northern, Santa Fe, Missouri Pacific, KATY, and Kansas City Southern Railroads.

After 18 months of procedural delays by the ORC, a hearing was held before the Oklahoma Corporation Commission on February 8, 1983. Proposed findings and orders were submitted to the Commission on February 25, 1983 and the matter is still pending.

As part of its effort to secure early action by the Oklahoma Corporation Commission, ETSI found it necessary to petition the Oklahoma Supreme Court to disqualify a newly appointed commissioner for a claimed conflict of interest. The State Supreme Court agreed with ETSI's position and for the first time in the history of Oklahoma, a commissioner was barred from considering a pending matter. Because of the lengthy and burdensome discovery attempted by the Oklahoma Railway Committee, ETSI was forced to secure a protective order from the Oklahoma Corporation Commission to protect project economics and its commercial contacts from discovery by its rail competitors.

Fortunately, ETSI did have support from four intervening major Oklahoma utilities. Oklahoma Gas & Electric, Public Service Company of Oklahoma, Grand River Dam Authority and Western Farmers Electric Cooperative all testified in support of the ETSI license. In addition to these utilities, the Plumbers and Pipefitters Local Union No. 798 of the AFL-CIO also intervened in support of the petition.

ETSI is confident of favorable action by the Oklahoma Corporation Commission now that the case has been heard and proposed findings and orders submitted. However, the railroad opposition has vowed to appeal a favorable decision to the Oklahoma Supreme Court. The present docket before the State Supreme Court leads ETSI's legal advisors to believe it will take up to one and a half years for the matter to be disposed of by the Court.

This is just one example of the delaying tactics which railroads have used against the ETSI Pipeline Project. In South Dakota as in Oklahoma, ETSI has been hampered by the dilatory practices of the railroads. ETSI's water source in South Dakota comes from the Oahe Reservoir. Some 270 miles of conventional pipeline (the West River Aqueduct) will be necessary to carry water west across the state from the Oahe Reservoir to Wyoming. Under current state statutes, ETSI may be able to condemn properties to construct the West River Aqueduct. However, a project of this nature has never tested these statutes, and in any case, an attempt to exercise such authority is certain to be challenged. The route of the West River Aqueduct traverses land held by over 150 individual landowners. To date, ETSI has acquired the necessary rights-of-way from over 70% of these owners. (See Exhibit 1) Active negotiations are underway with the remaining landowners. One of these, the Chicago and Northwestern Railroad (C&NW), has a right-of-way that intersects with the proposed route of the West River Aqueduct. The railroad has firmly refused to grant a crossing permit to the water pipeline for the one crossing necessary in South Dakota. Governor Janklow, on ETSI's behalf, appealed to the chief executive officer of the C&NW to permit the pipeline crossing, but to no avail.

During the current session of the South Dakota Legislature, proposed legislation providing a "quick take" provision to acquire rights-of-way from all landowners along the proposed route of the West River Aqueduct was defeated by the South Dakota House. However, on March 4, 1983, the Legislature did enact legislation providing this "quick take" remedy against other entities operating in South Dakota which already possess the power to use eminent domain authority, specifically railroads and utilities. Governor Janklow is expected to sign the legislation, thus permitting the West River Aqueduct line to at least cross the C&NW right-of-way. The C&NW has already indicated that it will challenge the constitutionality of this legislation when it becomes law.

Exhibit V details ETSI's similar experiences of constant railroad obstruction and delay in the states of Wyoming, Colorado, Kansas, Arkansas and Nebraska. Mr. Chairman, I believe it should be evident to you and Members of this Committee that ETSI's substantial experience with state eminent domain authority demonstrates the critical need for Federal eminent domain. In our judgment, there is no alternative means of providing a consistent, certain and rational basis for the development of major interstate coal pipeline projects.

SUMMARY

In summary, Mr. Chairman and Members of the Committee, the ETSI Pipeline Project has made substantial progress toward the development of our pipeline system. As I have outlined to you, our progress has been unnecessarily slow and costly. However, to assure completion of our project, we clearly need the enactment of S. 267. Let me emphasize again that this legislation provides coal pipelines with no subsidies, loan guarantees, Federal financial grants, or special tax benefits. ETSI will be completely funded by the private capital market. This legislation merely removes the legal obstacles which are being exploited daily by our opponents to prevent our entry, and the entry of pipelines like ours, into the coal transportation business. Enactment of S. 267 will allow us an opportunity to compete in the free market, and that's all we are asking.

Railroads now transport up to 75% of all coal shipments. We believe coal pipelines are needed to provide healthy competition and lessen railroad dominance over coal movement. From the first quarter of 1979 to the first quarter of 1982, railroad rates for coal traffic increased almost 50%, while the price of coal at the mine increased only about 19%.

Mr. Chairman, we believe that we can provide a service to this country by providing a more efficient, environmentally sound and less expensive means of transporting coal and still make a profit. Potential shippers to whom we expect to offer contracts in the near future are anxious for relief from the current monopoly in the coal transportation market. Financial institutions are equally interested in loaning private capital for an economically and technologically sound investment. Coal pipelines will substantially benefit electric power consumers. I also ask the Members of this Committee not to overlook the numerous construction and manufacturing jobs generated by this project, aside from the jobs related to the actual operation and maintenance of the pipeline.

Coal pipelines must be able to compete on an equal basis with the railroads. The western land grant railroads had access to Federal eminent domain authority and now have the right to enter into long-term contracts for coal unit trains. We -- who wish to compete with the railroads for coal transportation -- need the same rights. We also need the legal framework to secure adequate water supplies.

ETSI believes that if S. 267 is enacted, other companies will develop similar coal slurry projects with the same economic benefits and environmental safeguards. Without this legislation, our ability to complete the ETSI project will be severely hampered and we seriously doubt any other company is likely to attempt a major interstate coal slurry pipeline. But more importantly, Mr. Chairman, if S. 267 is not enacted, we are convinced that free market competition in the transportation of coal will be postponed indefinitely and the consumer will be left to bear the ever escalating costs of the railroads' monopoly.

CONSTRUCTION PERMITS

EXHIBIT I

STATE	PERMITS REQUIRED					NO. OF APPLICATIONS FILED					NO. OF PERMITS RECEIVED					PERCENT PERMITS RECEIVED				
	RAILROAD	HIGHWAY	WATER	UTILITY	TOTAL	RAILROAD	HIGHWAY	WATER	UTILITY	TOTAL	RAILROAD	HIGHWAY	WATER	UTILITY	TOTAL	RAILROAD	HIGHWAY	WATER	UTILITY	TOTAL
WYOMING	9	31	8	18	66	9	31	8	18	66	9	31	7	18	65	100	100	88	100	99
COLORADO	2	21	5	14	42	2	21	5	14	42	2	21	5	14	42	100	100	100	100	100
KANSAS	18	97	32	1	148	18	97	32	1	148	18	97	32	1	148	100	100	100	100	100
OKLAHOMA	15	98	6	2	121	15	98	6	2	121	15	98	6	2	121	100	100	100	100	100
ARKANSAS	8	74	17	0	99	6	16	16	0	38	5	15	14	0	34	63	20	82	100	34
TOTAL	52	321	68	35	476	50	263	67	35	415	49	262	64	35	410	94	82	94	100	86
WEST RIVER AQUEDUCT																				
SO. DAKOTA	1	18	2	10	31	1	0	2	0	3	0	0	2	0	2	0	0	100	0	6
WYOMING	0	7	0	0	7	0	7	0	0	7	0	5	0	0	5	0	71	0	0	71
TOTAL	1	25	2	10	38	1	7	2	0	10	0	5	2	0	7	0	20	100	0	18

*Main Slurry Pipeline with North Rawhide and North Antelope Laterals -- Cypress Bend Not Included.

Date: 03/4/83

RIGHT OF WAY ACQUISITION

PROGRESS REPORT*

STATE	REQUIRED		OWNERS ACQUIRED TO DATE	MILES ACQUIRED TO DATE	% OWNERS ACQUIRED	% MILES ACQUIRED
	OWNERS	MILES				
WYOMING	214	280	213	279.0	99.6	99.7
COLORADO	209	130	209	130.0	100.0	100.0
KANSAS	784	326	784	326.0	100.0	100.0
OKLAHOMA	643	250	570	214.5	88.5	85.0
ARKANSAS	1192	353	932	211.1	78.2	59.8
TOTAL	3042	1339	2708	1160.6	89.0	86.7
WEST RIVER AQUEDUCT:						
SO. DAKOTA	152	184	111	147.1	73.0	79.9
WYOMING	43	76	17	26.9	39.5	35.4
TOTAL	195	260	128	174.0	65.6	66.9

EXHIBIT II

THE ETSI WATER PROGRAM

As part of their water development program, the ETSI Project's sponsors considered the physical and legal availability of several water sources. This review was guided by a management determination that the coal pipeline project would not compete with agriculture for the scarce surface water available within the Powder River Basin. Primary emphasis was given to the development of previously underdeveloped water sources. After extensive analysis, two sources of water, one surface and one underground, became prime candidates for a source of supply. These sources were Oahe Reservoir and the Madison Limestone Formation.

Both sources are impressive in terms of physical availability. The six main stem dams on the Missouri can hold 73 million acre-feet of water. This is nearly three times the annual flow of the Missouri River at Sioux City, Iowa. The average annual storage behind the Oahe Dam is 18 million acre-feet. The U.S. Geological Survey had estimated that 1 billion acre-feet were stored in the Madison Formation. The Madison Limestone Formation was known to underlie the entire Powder River Basin.

The prospect of bringing a new source water into the Powder River Basin was considered with emphasis placed upon diverting water from large flood control reservoirs on the main-stem of the Missouri River. In this regard, the principle reservoir of interest was Oahe Reservoir located in central South Dakota. A study by an ad hoc committee of the Missouri River Basin Commission had estimated that 3 million acre-feet could be diverted for energy use in the northern great plains. The water would come from waters earmarked for future irrigation projects but as yet unappropriated. This water could be provided without any interference with existing or potential water users.

The closer location of the wellfield, and the fact that the slurry preparation facilities will be situated within the State of Wyoming, at first placed the Madison Formation in position of the primary water source. The Oahe Reservoir was considered a backup supply. Recent developments have now made the Oahe Reservoir ETSI's primary source.

As early as 1974, ETSI had undertaken efforts with the State of South Dakota and Federal agencies to secure the use of Oahe Reservoir water as a second or backup source. Although the South Dakota Legislature did approve such a proposal in 1977, final executive approval was withheld. This apparent setback was dramatically reversed in 1981 when Governor William Janklow responded favorably to a request from the ETSI Project to make Oahe Reservoir, rather than the Madison Formation, the primary source of supply.

As part of a 1981 special session of the South Dakota Legislature, enabling legislation was adopted which created a special class of water rights for energy industry projects. Diversion of water outside of the state by an energy industry was declared to be a "beneficial use". Also, authority was given to the South Dakota Conservancy District to enter into contracts for the assignment of water rights to energy industry users.

After three months of intense negotiations between top ETSI executives and the Governor of South Dakota and his Secretary of Water and Natural Resources, an agreement was executed in Rapid City, South Dakota, on December 23, 1981. The contract provided that ETSI would receive assignments of a South Dakota water right for 50,000 acre-feet per year and ETSI would have ten years to place the full appropriation to use.

As consideration for the water right assignment, ETSI will pay an annual water use fee of $9 million to be escalated according to changes in the Gross National Product. These payments are earmarked for state water development efforts including cost sharing programs with the federal government.

ETSI has also agreed to provide pipeline capacity in its waterline, free of charge, to deliver water to western South Dakota communities and rural water systems suffering from severe draught and chronic water quality problems. ETSI will bear the cost of constructing the costly pressure reduction systems at the points where the domestic systems will tie into ETSI's line.

As part of the approval process for ETSI's use of water from Oahe Reservoir, a companion water service agreement was signed on July 7, 1982 with the U.S. Bureau of Reclamation. This contract was reviewed and approved by the Secretary of the Interior and authorizes ETSI to use the storage capacity of the federal facility. As consideration for this agreement, ETSI will pay a service charge of $600,000 per year once water use is commenced.

Also, the U.S. Corps of Engineers issued construction permits for the location of intake facilities at the Reservoir. As part of this decision, an assessment of the impact of these structures was conducted which concluded no significant impact from the ETSI withdrawals would occur to municipal and industrial water users, recreation, fish and wildlife, and natural heritage values.

The final EIS prepared by the U.S. Bureau of Land Management on the ETSI Project found that the "widest range of beneficial uses, would be obtained by the use of Oahe" and that this alternative "would not affect the use of the environment by future generations". The amount of water transferred to ETSI is approximately ten percent of the annual net evaporation from Lake Oahe.

ETSI's experience demonstrates the ability of interstate coal pipeline projects to acquire water rights in a manner that is in the public interest, consistent with authorizing state laws, and acceptable to the pipeline's commercial interests. The ETSI Project has always had the highest regard for the authority of individual states to allocate waters within their boundaries and firmly believes that this is an area that must be left solely to the discretion of the individual states.

Exhibit III

THE ETSI PIPELINE PROJECT: ENVIRONMENTAL PROTECTION

The potential impact on the environment from the construction and operation of coal slurry pipelines has been examined in studies funded by industry and regulatory agencies. Overwhelming evidence supports the conclusions that:

- Coal slurry pipelines have environmental advantages over other methods for transporting coal.
- Coal slurry is not a hazardous material and its transportation by pipeline does not constitute a threat to public safety.

In general, the coal slurry pipeline is an environmentally attractive alternative to other methods of transporting coal. Pipelines are buried and do not interfere with surface activities. Shipment of coal by unit train, on the other hand, poses hazards of derailment and road crossing accidents. Coal slurry pipelines eliminate noise and dust problems. By contrast, during the movement of one 100-car unit train from Wyoming to Arkansas, approximately 10 tons of coal dust is blown into the atmosphere and the surrounding countryside and noise levels approach 100 decibels.

Specifically, this paper addresses questions related to pipeline ruptures and associated spills of coal slurry and the treatment and disposal of discharge waters from coal slurry pipelines.

Detailed technical responses to the issues raised by Senator Danforth last year are contained in the attached correspondence from the Slurry Transportation Association, Attachment A. Briefly stated, the two commercial coal slurry pipelines constructed in the United States have proven to be safe and have been operated without adverse environmental effects.

The first coal slurry pipeline, the Eastlake Pipeline, operated in Ohio without incident from 1957 to 1963. The Black Mesa Pipeline in Arizona (which serves a powerplant in Nevada) has been operational since 1970, and has experienced two separate interruptions of service. These pipeline ruptures and subsequent spills were not caused by corrosion or erosion of the pipe due to the flow of coal slurry, but rather by operator's error in one case and a construction error in the other. The only major spill occurred in 1977 when the operator of the Mohave Generating Station, facing an emergency at the generating station, closed the pipeline terminal valve without informing the pipeline operators. The line ruptured in two places spilling several hundred tons of coal onto the ground. The other spill took place in 1979 and was caused by an undetected construction flaw which caused a minor leak of 200 tons. The spilled coal was not removed in either case because environmental authorities for the State of Arizona and U.S. Department of the Interior Bureau of Land Management determined that to do so would have disturbed the environment more than leaving it in place, and that no damage had been done to game, fish or vegetation. After 6-12 months, the dried coal slurry had been dispersed by rainstorms and winds, and no evidence of a spill remained.

Operational experience has shown that the corrosive nature of coal slurry is minimal at worst, and that corrosion inhibitors are not required during the normal transportation of coal slurry. Corrosion inhibitors are used only in water plugs between batch shipments and for pipe flush water. It is not possible to eliminate metal loss completely, and corrosion/erosion is compensated for the provision of additional wall thickness, 2 mils per year, for the design life of the pipeline.

Based on pipeline industry experience, the frequency of ruptures and associated spills can be reduced to a minimum with adequate design and operating considerations. The design of the ETSI coal slurry pipeline specifies pressure alarms, automatic valve systems, emergency slurry holding tanks, real-time coal slurry metering systems, routine aerial reconnaissance, scheduled ground patrols, the use of heavier pipewall thicknesses and radiographic testing of the girth welds at water crossings, and the use of concrete coated pipes at stream crossings.

In response to unfounded concerns related to the disposal of waters from dewatering facilities, ETSI submits for the record recent technical information of the results of water analyses from coal slurry facilities which demonstrate that coal slurry pipelines can meet standards set for water discharges by federal, state and local environmental agencies, and that discharge waters will not adversely impact the quality of receiving streams.

The slurry transport industry's ability to manage water discharges in a safe and environmentally sound manner is based on years of operating experience gained from commercial dewatering plants at the Eastlake Pipeline in Ohio and the Mohave Generating Station in Nevada. Waters from the Eastlake Pipeline were discharged into Lake Erie with total suspended solid concentrations of only 5-10 parts per million. Discharge waters at the terminus of the Black Mesa Pipeline are cleaned by settling and flocculation, and are of reusable quality. Approximately 10% of the power station's cooling water make-up is provided by the dewatering plant, instead of being extracted from the Colorado River. The discharge water system at Mohave removes all but 20 parts per million of the suspended solids in the water. This low level would be suitable for most rivers and streams in this country; however, a treaty with Mexico requires that no water be discharged into the Colorado River.

In addition, ETSI has performed extensive simulation tests using representative samples of coal and water to characterize discharge water quality. To supplement this with practical experience, ETSI constructed a Coal Evaluation Plant at White Bluff, Arkansas to study and test full-scale equipment, operation and quality control associated with coal slurry systems. The ETSI Coal Evaluation Plant cost over $15 million to build and operate for 7 months. The discharge water system employed conventional settling ponds and flocculants to remove coal particles from the water. Flocculants enhance the settling process by loosely binding with the particles and increasing their density. Settling and flocculation systems are used throughout industry and have an excellent history of reliability.

Operational data from the Black Mesa Pipeline and the ETSI Coal Evaluation Plant demonstrate that minimal mitigation is necessary to achieve a water quality suitable for reuse of discharge waters in the power plant or for discharge to receiving streams. Waters from the ETSI Coal Evaluation Plant had fewer total suspended solids that the original water from the Arkansas River and satisfied environmental standards for discharge into surface watercourses. After settling and flocculation with alum and lime, the biochemical oxygen demand concentrations of the discharge waters were much lower than the permitted discharge value of 30 parts per million for all water sources tested. Biological systems will not be required to treat discharge waters at ETSI's commercial plants.

Analyses of discharge waters from the ETSI Coal Evaluation Plant indicate that neither complicated, costly nor land-intensive facilities will be required for treatment or disposal of discharge waters from coal slurry pipelines. At the ETSI Coal Evaluation Plant, the rate of water discharge averaged 450,000 gallons per day, and two settling ponds, with a combined area of approximately one acre, were employed. Designs of ETSI commercial dewatering facilities specify settling pond requirements of approximately eight acres. The settling ponds will be lined with compacted clay or an approved synthetic material, and precautions will be taken to insure the containment of waters prior to discharge. Where required, ponds will be monitored to protect groundwaters. A sludge of coal, alum and lime accumulates at the bottom of the settling ponds and will be disposed of using practices recommended and approved by the U.S. Environmental Protection Agency (EPA) for the on-site disposal of industrial solid wastes.

Results of recent studies by Dr. J.W. Moore, and Dr. A.H. Plummer, et al., indicate that no organic compounds deemed hazardous or toxic have been detected in discharge waters from commercial coal slurry operations, from industry pilot facilities, or from laboratory simulations. Investigations of actual and simulated discharge waters have not indicated the presence of any of the 113 organic compounds listed as priority pollutants by the EPA. Furthermore, dissolution of metal ions indigenous to the coal does not occur to any significant extent, and the heavy metals in coal are generally insoluble in water under the operating conditions of coal slurry. The heavy metals listed as priority pollutants by the EPA have not been detected in concentrations approaching the discharge standards set by federal and state environmental agencies for industrial water quality under the Federal Water Pollution Control Act of 1972. Studies show that concentrations of heavy metals in the discharge water do not differ appreciably from those in the original water. Comparisons for the discharge water and input water for the ETSI Coal Evaluation Plant appear in Attachment B. Discharge water quality is more dependent upon the innate quality of the transport water than changes resulting from contact with the coal. Leaching out of these metals which are of concern to environmental agencies is not significantly influenced by the coal/water contact time. Discharge water from the ETSI Coal Evaluation Plant did not contain detectable concentrations of these priority pollutants.

Water quality information from simulation tests and from the ETSI Coal Evaluation Plant were used in formal permit applications to environmental agencies for the discharge of waters in Arkansas and Oklahoma. Water quality parameters and water quality characteristics used by ETSI in filing for permits appear in Attachment C. Attachment D lists the concentrations of metals in the discharge water at the ETSI Coal Evaluation Plant, which are very low and below state effluent limits. Coal slurry pipeline developers have invested substantial expenditures and efforts to verify that facilities can be operated in a safe and environmentally sound manner. Additional security can be gained from recognizing that the necessary water discharge permits cannot be obtained without compliance with federal, state and local environmental regulations. Under Section 402 of the Federal Water Pollution Control Act Amendments of 1972, it is unlawful to discharge into federal waters until a permit has been issued in accordance with the National Pollutant Dischage Elimination System (NPDES).

In addition to these federal standards, ETSI must comply with the industrial water quality standards promulgated by the states being considered for coal delivery sites. State water quality agencies have recently issued discharge permits for facilities at Independence, White Bluff and Cypress Bend in Arkansas, as well as Sooner, Pryor and Muskogee in Oklahoma. These states have certified ETSI's ability to meet state stream standards to the Regional Office of the EPA for Region VI (Dallas). After the necessary period for public review and comment, Region VI EPA has determined that permits under the NPDES for the above facilities can be issued in a routine manner. ETSI expects to have these NPDES permits approved and in hand by the end of this month. Attachment E consists of transmittal letters from the States of Arkansas and Oklahoma granting ETSI six separate water discharge permits. For the record, one of the detailed orders issued by the Oklahoma Water Resources Board for a discharge facility in Pawnee County, Oklahoma is submitted as Attachment F. The permit applications in Oklahoma are actively protested by the Kansas City Southern Railroad, the Sierra Club, and the Iowa, Nebraska and Rocky Mountain Chapters of the Farmer's Educational and Cooperative Union. However, Paragraph 4 in the Board's February 8, 1983 order addressing its conclusion of law states, in pertinent part, that:

> "In this regard the Board finds and determines that the evidence presented by the Protestants was insufficient to show that pollution to waters of the state would occur if effluent from a proposed coal slurry pipeline dewatering plant was discharged, in accord with the parameters and conditions set forth in the draft permit. . ."

In conclusion it should be stated that water discharge and other environmental requirements were addressed in the EIS prepared by the U.S. Bureau of Land Management for the ETSI Pipeline Project in July 1981. No adverse impacts on vegetation or wildlife were reported.

LITERATURE REFERENCES

"Water Quality Aspects of Coal Slurry Pipelining - A Literature Survey"

J. W. Moore

Proceedings of the Seventh International Technical Conference on Slurry Transportation, March 1982.

"Water Quality as a Factor in the Reuse and Disposal of Coal Slurry Water"

H. S. Peavy

Proceedings of the Seventh International Technical Conference on Slurry Transportation, March 1982.

"The Effects of Coal Slurry Pipelining of Eastern Coal on Water Quality"

J. W. Moore

Proceedings of the Sixth International Technical Conference on Slurry Transportation, March 1981.

"Effluent Characteristics and Discharge Permit Considerations for the ETSI Coal Slurry Pipeline"

A. H. Plummer, R. H. Derammelaere, and F. M. Eiserman

Proceedings of the Sixth International Technical Conference on Slurry Transportation, March 1981.

"The Environmental and Pollution Aspects of Coal Slurry Pipelines"

R. R. Faddick

Prepared for the Industrial Research Laboratory, Office of Research and Development, U.S. Environmental Protection Agency, EPA - 600/2 - 79-067, March 1979.

Attachment A

JOHN C. DANFORTH
MISSOURI

United States Senate
WASHINGTON, D.C. 20510

August 12, 1982

The Honorable John H. Chafee
Chairman
Subcommittee on Environmental Pollution
Committee on Environment and Public Works
United States Senate
61 Capitol Hill Apartments
Washington, D. C. 20510

Dear John:

The Energy and Natural Resources Committee has voted to report S. 1844, legislation giving the power of federal eminent domain to coal slurry pipelines.

I have recently been made aware of the potential environmental threat posed by such pipelines. I am told that, because of the corrosive nature of the coal slurry, the potential for pipeline breaks is high. The Black Mesa coal slurry pipeline has already had two major spills. Some of the adverse impacts of those spills were lessened by the pipeline's desert location, but the chemicals associated with coal slurry could pose a major pollution threat if a pipeline break occurred near a water source.

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Additionally, use of scarce western water for the transportation of coal could have a significant adverse impact on fish and wildlife resources in the region.

Accordingly, I urge you to put a hold on S. 1844 and to hold a hearing on the environmental effects of coal slurry pipelines before your Subcommittee on Environmental Pollution before this legislation comes to the Senate floor. I understand that Senator Stafford is taking a similar course with regard to the water use issues raised by the bill and by the Supreme Court's Sporhase decision.

Sincerely,

Jack

John C. Danforth

SLURRY TRANSPORT ASSOCIATION
490 L'Enfant Plaza East, S.W., Suite 3210
Washington, D.C. 2002

George H. Eatman
Executive Director

(202) 554-4700

RECEIVED
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M. L. DINA

August 30, 1982

The Honorable John H. Chafee
United States Senate
Dirksen Senate Office Building
Room 5229
Washington, D.C. 20510

Dear Senator Chafee:

At the request of both your personal staff and that of the Senate Committee on Environment and Public Works Subcommittee on Environmental Pollution, the Slurry Transport Association is responding to the remarks contained in Senator Danforth's August 12, 1982 letter to you requesting hearings before your Subcommittee on S. 1844, the Coal Distribution and Utilization Act of 1982. Specifically, Senator Danforth voiced concern regarding the following matters:

- that a potential environmental threat is posed by the corrosive nature of coal slurry and associated pipeline spills,
- that the chemicals associated with coal slurry could pose a major pollution threat, and;
- that the use of western water for coal transportation will have an adverse impact on fish and wildlife in the region.

By way of background let me begin by pointing out that to date there have been two commercial coal pipelines constructed in the United States, the operation of which has proven to be both environmentally preferable and safe and technologically sound. The first of these pipelines was the 10-inch Cadiz, Ohio, to Cleveland, Ohio, line (capacity: 1.3 million tons per year) which operated without incident or interruption from 1957 to 1963. The line was "mothballed" after having forced a reduction in railroad coal hauling rates to its utility customer from $3.54 per ton in 1957 to $1.88 per ton in 1963; a reduction of 47 percent. Today the rate per ton is $4.10. The second pipeline which has been operational since 1970 is the 18-inch Black Mesa pipeline (capacity: 5 million tons per year) running 273 miles from northeastern Arizona to southern Nevada. This line, which has very competitive coal hauling rates, has experienced two separate interruptions of service. Details on these incidents are discussed below.

On the Black Mesa pipeline it should be noted that only one of these spills can be characterized as "major" and that in both cases the pipeline ruptures and subsequent spills were not caused by corrosion or erosion of the pipe sections due to the flow of slurry or flush water, but rather by operator's error in one case and a construction error in the other. The major spill occurred in 1977 when the operator of the Mohave Generating Station, facing an emergency at the generating station, knowingly closed the pipeline terminal valve without informing the pipeline operators. The line ruptured in two places spilling several hundred tons of coal onto the ground. The second spill took place in 1979 and was caused by an undetected construction flaw which caused a minor leak of 200 tons. In both instances the pipeline ruptures spilled non-toxic coal slurry and caused no environmental threat. The pipeline outages did not significantly interrupt service to the powerplant. The spilled coal was not removed because environmental authorities for the State of Arizona and Department of Interior Bureau of Land Management determined that to do so would have been more detrimental to the environment than leaving it in place, and that no damage had been done to game, fish or vegetation. In 6-12 months time, the dried coal slurry had been dispersed by rainstorms and winds and no evidence of a spill remained. By way of comparison, it should be noted that during the movement of one 100 car unit train (100 tons of coal per car) from Wyoming to Arkansas, approximately 10 tons of coal dust is blown from the train into the atmosphere and the surrounding countryside (OTA 1977). The same unit train in a round trip between southern Wyoming and Kansas City would according to the BLM EIS on the proposed ETSI pipeline yield the following pollutant emissions (in tons per trip): carbon monoxide, 1.4; hydrocarbons, 0.6; nitrogen oxides, 3.5; particulates, 0.2; sulfur oxides, 0.5.

In his letter, Senator Danforth mentions "the potential environmental threat" posed by coal pipelines and specifically says that the "corrosive nature of coal slurry" carries with it a high potential for pipeline breaks. Operational experience gained thus far has shown that the corrosive nature of coal slurry is minimal at worst and that minor corrosion which does occur can be attributed to the dissolved oxygen content of the water used to transport the coal. With specific reference to dissolved oxygen, it has been learned from operating coal slurry pipelines that with proper handling procedure when the coal is mixed with the water, the coal itself absorbs the dissolved oxygen and eliminates the corrosion potential. It has also been clearly demonstrated that the coal slurry is non-toxic.

Corrosion control will be maintained in all slurry pipelines systems. In the Ohio pipeline, this was achieved by injecting an inhibitor. However, neither an inhibitor nor any other corrosion control system (other than proper water and coal slurry handling procedures to minimize dissolved oxygen) is used in the Black Mesa Pipeline when pumping coal slurry. Inhibitors are utilized when pipeline flush water is pumped. The pipe flush water is treated to control corrosion caused by dissolved oxygen in the flush water since no coal is present to absorb this oxygen.

In most systems, however, it is not possible to totally eliminate corrosion/erosion metal loss completely. Therefore, residual corrosion/erosions is allowed for by the provision of additional pipe wall thickness for the design life of the project. That nominal allowance is a total of 2 mils per year for corrosion/erosion. The Black Mesa Pipeline and the ETSI pipeline both are designed for 2 mils per year. After 12 years of operation, routine measurements on the Black Mesa pipeline have indicated that the 2 mils/year allowance is more than sufficient.

With general respect to ruptures and spills, comments from a June, 1982 study from the Virginia Center for Coal and Energy Research were as follows:

> "Pipeline ruptures and spills are of frequent concern to many. However, based on the available technological experience, frequency as well as incurred damages due to such incidences can now be reduced to a minimum with adequate design considerations, and not necessarily at any substantial costs contrary to the common conceptions. An extremely detailed account of environmental considerations in this respect and related design provisions are given in the Final Report of the Environmental Impact Statement prepared for the Energy Transportation Systems, Inc.

pipeline (ETSI (1981)), in the form of responses to the various comments and questions forwarded by the concerned parties. The remarks in this respect can be summarized as follows: '...Special considerations that would minimize or avoid slurry spills in wetlands and waterways are incorporated in the final design, in association with the pumping stations, pipelines aerial reconnaissance and ground patrols. Pressure alarms, automatic valve interlock systems, emergency slurry holding tanks and flush ponds, real-time coal slurry metering systems, regular low-level aerial reconnaissance (as a part of normal pipeline operation to detect any activities along the pipeline route that may have adverse effects such as excavation by a third party, washouts, erosion, landslides or slumping), regularly scheduled ground patrols (to inspect sensitive areas such as major and scenic stream crossing, very populous areas and environmentally sensitive areas), the use of heavier pipe wall thicknesses and radiographic testing of the girth welds at all water crossings (to ensure greater pipeline strengths at these locations and divert any pipeline failures to other, weaker sections), and the use of concrete coated pipes at stream crossings are all a part of these special considerations.'"

Concerning biological impacts of spills and ruptures, the same study noted that "...simulation tests...indicate that potential toxic elements and compounds are not expected to be present in sufficient concentrations to result in any significant bioaccumulation following a spill... Only a few of the constituents found in the slurry water are expected to exceed federal drinking standards, and spills entering surface waters would generally be diluted rapidly to levels within the federal standards. Thus, no long-term impacts are anticipated to the health or safety of any human as a result of a coal slurry spill at any time during the project life... In most spill situations, however, it is anticipated that the affected communities would implement a water quality monitoring program for a period of time following a spill to ensure drinking water standards are not producing

> any residual effects on water quality... (Again), no significant impacts are expected to occur from a spill as most towns have at least a 24-hour storage supply, should water intakes be temporarily shut down for various reasons including maintenance..."
>
> With regard to the mechanism of ruptures and spills, the Virginia Study notes that "...If a Slurry line ruptures, there will be a roar, a spray of suspended fluid (usually water) and a burst of fine-grained coal particles around a 50 to 100-foot diameter area. The pressure loss immediately signals a shut-down of the line and no further losses will occur. The slurry line is unearthed, repaired, reburied and back in service in usually within a day... Very small leaks (¼-inch or smaller) invariably seal themselves. Fluid and dust-size coal may accumulate over and around a larger leak. Such leaks are spotted by maintenance/surveillance crews and repairs made in a very short time. Even a maximum pressurized system (1700 psi), if it were to rupture, would spill much less than 100 tons (a rail coal car full of coal)..."
>
> Finally, in the report by OTA (1978), it is concluded, that "...only one coal slurry pipeline spill has been recorded, and the environmental impacts, are therefore only speculative... (All of) these impacts, however, are not likely to be severe..."

In his letter, Senator Danforth mentions that "... use of scarce western water for the transportation of coal could have a significant adverse impact on fish and wildlife resources in the region." It is important to note that coal slurry pipeline construction and operation will be subject to all federal and state environmental laws. The most important federal requirement is contained in the National Environmental Policy Act requiring preparation of an Environmental Impact Statement (EIS). The Department of Interior issued a two-volume final EIS on the proposed ETSI coal slurry pipeline project and concluded that there would be no adverse impacts on vegetation or wildlife.

Finally, the water protection provision of S. 1844 (Sections 6 and Subsection 4(a)) actually enhance the protection a state has over its water resources. The language was carefully crafted by western Congressmen and Senators with advice from numerous legal constitutional and water experts. The derivation of this language is discussed extensively in the report language to S. 1844 of the Senate Energy Committee.

If you have additional concerns or questions, we will be glad to assist you.

Very truly yours,

George H. Eatman

GHE:jpp

ATTACHMENT B

Metal	ETSI Coal Evaluation Plant Water Discharge (average) parts per billion	Original Input Water from Arkansas River parts per billion	Safe Drinking Water Act Maximum Contaminant Levels parts per billion Primary	Secondary
Arsenic	not detected	less than 2	50	
Barium	not detected	less than 74	1000	
Boron	59	144		
Cadmium	5	1.8	10	
Chromium	5	less than 3.4	50	
Cobalt	14	7		
Copper	6	7.2		1000
Lead	38	15.4	50	
Manganese	87	28		50
Mercury	less than 0.2	less than 0.32	2	
Nickel	67	15		
Selenium	less than 20	20	10	
Silver	2	1.6	50	
Zinc	97	16		5000

ATTACHMENT C

Parameter	ETSI Permit Limits Water Discharge (average) parts per million	ETSI Coal Evaluation Plant Water Discharge (average) parts per million
Biochemical Oxygen Demand (BOD_5)	30	1.7
Total Suspended Solids (TSS)	30	12.6
Total Dissolved Solids (TDS)	2000	764
Sulfate	1200	625
Chloride	20	not detected
pH range - after neutralization	6-9	6-8

ATTACHMENT D

Metal	ETSI Coal Evaluation Plant Water Discharge (average) parts per billion	Effluent Limits parts per billion	
		Arkansas	Oklahoma
Arsenic	not detected	50	200
Barium	not detected	5000	no limit
Boron	59	1000	1000
Cadmium	5	20	30
Chromium	5	500	100
Cobalt	14	no limit	1000
Copper	6	200	100
Manganese	87	1000	200
Mercury	less than 0.2	5	5
Nickel	67	800	1000
Selenium	less than 20	20	50
Silver	2	100	100
Zinc	97	500	1000

1707-5-7

020777

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE, P.O. BOX 9583
LITTLE ROCK, ARKANSAS 72209

PHONE: (501) 562-7444

#1

Attachment E

RECORD FILE

December 16, 1982

Mr. Edward J. Wasp
Executive Vice President
ETSI Pipeline Project, A Joint Venture
Post Office Box 7598
San Francisco, California 94120

RE: White Bluff [illegible]

Dear Mr. Wasp:

The enclosed permit (No. 2792-W) is your authority to construct, operate and maintain the waste disposal system as set forth in your application dated July 26, 1982.

This permit is granted under current laws and regulations of the State of Arkansas and is subject to the provisions of Act 472 of 1949, as amended (Sec. 82-1901 et seq., Ark. Stats.) and the terms and conditions stated therein.

Copies of the Department's Discharge Monitoring Report Form have been enclosed for your use in reporting effluent sampling results to the Department. Instructions for completion and submission of these forms are contained on the reverse side of the form and in Part II, Section C, paragraph 5 of the permit.

Sincerely yours,

Jarrell E. Southall

Jarrell E. Southall
Director

JES:czp

Enclosures

C20777

35-0185

Permit No. 2792-W
(Corresponds to
NPDES Permit No. AR N/A .

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

WATER POLLUTION CONTROL PERMIT

In compliance with the provisions of the Arkansas Water and Air Pollution Control Act (Act 472 of 1949, as amended, Sec. 82-1901 et. seq., Ark. Stats.),

ETSI Pipeline Project, A Joint Venture
Post Office Box 7598
San Francisco, California 94120

is authorized to construct and operate a facility in accordance with the plans and specifications as approved by the Department of Pollution Control and Ecology, to be located at

the Arkansas Power and Light Company generating plant (White Bluff) approximately 3 miles southwest of Redfield, Arkansas in Jefferson County

Any discharge shall be to the receiving stream named

✓ Arkansas River in Segment 3C

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit is issued in reliance upon the statements and representations made in the application and the plans and specifications and the Department has no responsibility for the adequacy or proper functioning of the disposal system. Approval of the plans and specifications by the Department does not constitute assurance that the disposal system will achieve the effluent limitations required by the permit.

This permit shall become effective on December 16, 1982.

This permit and the authorization to discharge shall expire at midnight, December 16, 1987.

Signed this day of

Darrell E. Southall

Darrell E. Southall
Director

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE. P.O. BOX 9583
LITTLE ROCK. ARKANSAS 72209
PHONE: (501) 562-7444

[illegible] 020778

#2

December 16, 1982

RECORD FILE

Mr. Edward J. Wasp
Executive Vice President
ETSI Pipeline Project, A Joint Venture
Post Office Box 7598
San Francisco, California 94120

RE: Cypress Bend Plant [illegible]

Dear Mr. Wasp:

The enclosed permit (No. 2793-W) is your authority to construct, operate and maintain the waste disposal system as set forth in your application dated August 12, 1982.

This permit is granted under current laws and regulations of the State of Arkansas and is subject to the provisions of Act 472 of 1949, as amended (Sec. 82-1901 et seq., Ark. Stats.) and the terms and conditions stated therein.

Copies of the Department's Discharge Monitoring Report Form have been enclosed for your use in reporting effluent sampling results to the Department. Instructions for completion and submission of these forms are contained on the reverse side of the form and in Part II, Section C, paragraph 5 of the permit.

Sincerely yours,

Jarrell E. Southall
Director

JES:czp

Enclosures

C20778

JA[illegible]

21-0056

Permit No. 2793-W
(Corresponds to
NPDES Permit No. AR N/A

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

WATER POLLUTION CONTROL PERMIT

In compliance with the provisions of the Arkansas Water and Air Pollution Control Act (Act 472 of 1949, as amended, Sec. 82-1901 et. seq., Ark. Stats.),

ETSI Pipeline Project, A Joint Venture
Post Office Box 7598
San Francisco, California 94120

is authorized to construct and operate a facility in accordance with the plans and specifications as approved by the Department of Pollution Control and Ecology, to be located at

approximately ½ mile west of Highway 4 near Cypress Bend of the Mississippi River. near Arkansas City, Desha County.

Any discharge shall be to the receiving stream named

✓ Mississippi River in Segment 6A

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit is issued in reliance upon the statements and representations made in the application and the plans and specifications and the Department has no responsibility for the adequacy or proper functioning of the disposal system. Approval of the plans and specifications by the Department does not constitute assurance that the disposal system will achieve the effluent limitations required by the permit.

This permit shall become effective on December 16, 1982.

This permit and the authorization to discharge shall expire at midnight, December 16, 1987.

Signed this day of

Jarrell E Southall

Jarrell E. Southall
Director

020779

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE. P.O. BOX 9583
LITTLE ROCK. ARKANSAS 72209
PHONE: (501) 562-7444

#3

RECORD FILE

December 16, 1982

Mr. Edward J. Wasp
Executive Vice President
ETSI Pipeline Project, A Joint Venture
Post Office Box 7598
San Francisco, California 94120

RE: Independence Plant

Dear Mr. Wasp:

The enclosed permit (No. 2794-W) is your authority to construct, operate and maintain the waste disposal system as set forth in your application dated July 26, 1982.

This permit is granted under current laws and regulations of the State of Arkansas and is subject to the provisions of Act 472 of 1949, as amended (Sec. 82-1901 et seq., Ark. Stats.) and the terms and conditions stated therein.

Copies of the Department's Discharge Monitoring Report Form have been enclosed for your use in reporting effluent sampling results to the Department. Instructions for completion and submission of these forms are contained on the reverse side of the form and in Part II, Section C, paragraph 3 of the permit.

Sincerely yours,

Jarrell E. Southall
Director

JES:csp

Enclosures

Stickley

C23498

JAMES R. BARNETT, Executive Director
MICHAEL R. MELTON, Assistant Director

OKLAHOMA WATER RESOURCES BOARD

P.O. BOX 53585 • 1000 N.E. 10TH STREET • OKLAHOMA CITY, OKLAHOMA 73152 • (405) 271-2555

February 14, 1983

Re: Application No. WD-81-015
Muskogee Dewatering Plant

Mr. Frank Odasz
ETSI Pipeline Project, A Joint Venture
P.O. Box 7598
San Francisco, California 94120

Dear Mr. Odasz:

This letter is to advise you that on February 8, 1983, the Oklahoma Water Resources Board, meeting in its regular monthly session, approved the enclosed Order of the Board.

Any appeal of this decision shall be taken as provided in the Administrative Procedures Act, 75 O.S. 1981.

If you have any questions concerning this matter, please do not hesitate to contact this office.

Sincerely,

James C. Adams
f/ Ron Jarman, Chief
Water Quality Division

RLJ:sdh

Enclosure as stated

cc: The Law Firm of Brown, Roady, Bonvillian & Gold
Dr. Marvin Baker, Sierra Club

GERALD E. BORELLI, Chairman
EARL WALKER, Vice-Chairman
L. L. MALES, Secretary

ERNEST R. "Jack" TUCKER, Member
JOHN B. JARBOE, Member
ROBERT S. KERR, JR., Member

R. G. JOHNSON, Member
RALPH G. McPHERSON, Member
GARY W. SMITH, Member

C23499

FEB [illegible]

Stickley

JAMES R. BARNETT, Executive Director
MICHAEL R. MELTON, Assistant Director

OKLAHOMA WATER RESOURCES BOARD

P.O. BOX 53585 • 1000 N.E. 10TH STREET • OKLAHOMA CITY, OKLAHOMA 73152 • (405)271-2555

February 14, 1983

Re: Application No. WD-81-017
Pryor Dewatering Plant

Mr. Frank Odasz
ETSI Pipeline Project, A Joint Venture
P.O. Box 7598
San Francisco, California 94120

Dear Mr. Odasz:

This letter is to advise you that on February 8, 1983, the Oklahoma Water Resources Board, meeting in its regular monthly session, approved the enclosed Order of the Board.

Any appeal of this decision shall be taken as provided in the Administrative Procedures Act, 75 O.S. 1981.

If you have any questions concerning this matter, please do not hesitate to contact this office.

Sincerely,

James C. Adams

for Ron Jarman, Chief
Water Quality Division

RLJ:sdh

Enclosure as stated

cc: The Law Firm of Brown, Roady, Bonvillian & Gold
Mr. Jim Whitlock, City of Broken Arrow
Ms. Patty Eaton, City of Tulsa
Mr. Jerry Lasker, INCOG
Mr. Randy Nobles, EODD
Mr. Gordon Hoppe, NECO
Dr. Marvin Baker, Sierra Club

GERALD E. BORELLI, Chairman
EARL WALKER, Vice-Chairman
L. L. MALES, Secretary

ERNEST R. "Jack" TUCKER, Member
JOHN B. JARBOE, Member
ROBERT S. KERR, JR., Member

R. G. JOHNSON, Member
RALPH G. McPHERSON, Member
GARY W. SMITH, Member

Stickley

C23500

FEB 17 1983

JAMES R. BARNETT, Executive Director
MICHAEL R. MELTON, Assistant Director

OKLAHOMA WATER RESOURCES BOARD

P.O. BOX 53585 • 1000 N.E. 10TH STREET • OKLAHOMA CITY, OKLAHOMA 73152 • (405)271-2555

February 14, 1983

Re: Application No. WD-81-016
Sooner Dewatering Plant

Mr. Frank Odasz
ETSI Pipeline Project, A Joint Venture
P.O. Box 7598
San Francisco, California 94120

Dear Mr. Odasz:

This letter is to advise you that on February 8, 1983, the Oklahoma Water Resources Board, meeting in its regular monthly session, approved the enclosed Order of the Board.

Any appeal of this decision shall be taken as provided in the Administrative Procedures Act, 75 O.S. 1981.

If you have any questions concerning this matter, please do not hesitate to contact this office.

Sincerely,

James C. Adam
f/ Ron Jarman, Chief
Water Quality Division

RLJ:sdh

Enclosure as stated

cc: The Law Firm of Brown, Roady, Bonvillian & Gold
Dr. Marvin Baker, Sierra Club
Mr. George Bocox

GERALD E. BORELLI, Chairman
EARL WALKER, Vice-Chairman
L. L. MALES, Secretary

ERNEST R. "Jack" TUCKER, Member
JOHN B. JARBOE, Member
ROBERT S. KERR, JR., Member

R. G. JOHNSON, Member
RALPH G. McPHERSON, Member
GARY W. SMITH, Member

Attachment F

BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA

February 8, 1983

IN THE MATTER OF THE APPLICATION for a Waste Disposal Permit of ETSI Pipeline Project, A Joint Venture, to discharge industrial wastewater at a point located in the NW¼ of the NW¼ of the NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.	APPLICATION NO. WD-81-016 ORDER NO. WQ-83-02-08-01

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND BOARD ORDER

This matter came on for hearing before the Oklahoma Water Resources Board (hereinafter "Board"), December 17, 1982, on the above styled waste disposal permit application of ETSI Pipeline Project, A Joint Venture (hereinafter "Applicant"), the same said matter being an administrative proceeding conducted and authorized pursuant to the provisions of 75 O.S. 1981, §§309 and 310 and 82 O.S. 1981, §§926.3 and 926.4, and as otherwise authorized under the laws of the State of Oklahoma, and the Rules and Regulations of the Board. Mr. Ron Jarman, Water Quality Division Chief, presided over the proceedings as Hearing Examiner. Ms. Margaret Graham was Recording Secretary for the Board. Appearing personally on behalf of the Applicant were Mr. Frank Odasz, Ms. Betty Jordan, Mr. Steve Monn, and Mr. Dennis Stickley, Attorney for the Applicant. Appearing personally as Protestants were Dr. Marvin Baker from the Sierra Club and Mr. George Bocox. Also appearing at the hearing from the Board, were Dr. Nancy Cain, Section Head of Permitting; Mr. Brooks Kirlin and Mr. Tom Blachly, permit writers; Mr. Dean Couch, Staff Attorney; Mr. R. Thomas Lay, General Counsel. Others present at the hearing were Mr. Gary Hunt, Mr. Rich Hackney, and Mr. Jim Pollard. Several letters of inquiry and protest were mailed to the Board prior to the hearing.

The instant proceedings were duly opened, all persons in attendance were introduced for the record, opening remarks were entertained, preliminary instruments and exhibits were admitted, all evidence was received and introduced, comments and closing statements were made, and the hearing was thereupon deemed completed.

FINDINGS OF FACT

Based upon a review and consideration of all relevant, material, and competent evidence presented and matters officially noticed, and having duly considered all evidence, arguments and statements of the parties, the Board makes and enters the following Findings of Fact, all being as supported and sustained by the substantial and competent evidence herein.

1) The Board finds and determines, as a matter of fact, that on the 20th day of April, 1981, ETSI Pipeline Project, A Joint Venture, made application for a waste disposal permit to discharge industrial wastewater into the waters of the state, said wastewater to consist of process water, boiler blowdown, batching water, excess delivery water, and treated sanitary wastewater, from a coal slurry pipeline dewatering plant, said plant to be located within the boundaries of the Oklahoma Gas and Electric Company's Sooner Generating Station in the NE¼ of the SW¼ of the NE¼ of Section 23, T23N, R2EIM, Noble County, Oklahoma.

2) The Board finds and determines, as a matter of fact, that a draft waste disposal permit, based upon data in the application and a statement of the rationale for development, was prepared by Board staff. The Board further finds and determines that said draft permit contains statements of all permit conditions, all required compliance schedules, all monitoring requirements, and all applicable effluent limitations, standards, prohibitions and other appropriate conditions and management requirements and responsibilities.

as contemplated and required by Rule 1035.2 of the Rules and Regulations of the Board.

3) The Board finds and determines, as a matter of fact, based upon a review and consideration of all notices and publications incidental thereto and all affidavits and instruments otherwise submitted, including Board Exhibits "B", "C-1" and "C-2," that notice of the hearing on the draft permit, which permit is referred to in Finding of Fact No. 2, was published on November 11, 1982 and November 18, 1982, in newspapers of general circulation in both Noble and Pawnee Counties, Oklahoma.

4) The Board finds and determines, as a matter of fact, that the effluent from the coal slurry dewatering plant, more specifically described in Finding of Fact No. 1, will be discharged into the Arkansas River in Pawnee County, at a location more specifically described in the caption above. The Board further finds and determines, as a matter of law and fact, that the 1979 Oklahoma Water Quality Standards provide that the beneficial uses of the Arkansas River in the area of the discharge location and at the end of the mixing zone are Emergency Public and Private Water Supply, Fish and Wildlife Propagation, Agriculture, Municipal and Industrial Cooling Water, Primary Body Contact Recreation, Secondary Body Contact Recreation, and Aesthetics. The Board further finds, as a matter of fact, that the Arkansas River, in the area of the discharge location, flows continuously throughout the year.

5) The Board finds and determines, as a matter of fact, that the Applicant has provided and submitted technical support documents, reports, and studies, including information with regard to projected concentrations of effluent constituents based on data generated at a Coal Evaluation Plant located in the State of Arkansas. The Board also finds, as a matter of fact, based on information submitted by Applicant, that the proposed process used to dewater coal from the coal slurry pipeline will incorporate centrifuges, belt presses, and evaporation in vibrating bed dryers.

6) The Board concludes, as a matter of law and fact, based upon information and data available at the Board, including but not limited to information and data submitted by the Applicant, that the receiving water at the end of the mixing zone of discharges which contain contaminants in concentrations and loading amounts as set forth in the instant draft permit will meet the 1979 Oklahoma Water Quality Standards which were promulgated to protect the beneficial uses designated for the Arkansas River segment in which the end of the mixing zone lies.

7) The Board acknowledges Protestant Bocox's concern, set forth in a letter identified as Board's Exhibit D, that the discharges from the coal slurry dewatering plant might contaminate Oklahoma Gas and Electric's cooling reservoir, water from which flows into Greasy Creek. The Board further acknowledges the concerns and request for deferral of action on the instant application and draft permit, as set forth in a letter from legal counsel for the Kansas City Southern Railway Company, the Sierra Club, and the Nebraska, Rocky Mountain, and Iowa Chapters of the Farmers Educational and Cooperative Union of America (identified as Board's Exhibit F), until additional technical data on the characteristics of the proposed effluent are submitted by Applicant and made available for review.

CONCLUSIONS OF LAW

Upon review and consideration of all matters presented, the Board finds and enters the following conclusions of law:

1) The Board finds and determines, as a matter of law, that it possesses the requisite jurisdiction and authority to entertain and adjudicate the instant waste disposal permit

application proceedings, pursuant to the laws of the State of Oklahoma, with particular, but not exclusive, reference to the provisions of 82 O.S. 1981, §§926.3 and 926.4.

2) The Board finds and determines, as a matter of law and fact, that due and proper publication notice of the instant application and draft permit proceedings has been made and provided as contemplated by 82 O.S 1981, §926.4 and the Rules and Regulations of the Board. The Board further finds and determines, as a matter of law and fact, that the instant waste disposal permit application and draft permit have been filed and brought before the Board in compliance with the requirements of the Rules and Regulations of the Board, with particular, but not exclusive respect to Rule 1025.1 et seq. and Rule 1035.1 et seq. The Board further finds and determines, as a matter of law and fact, that the proceedings held herein were conducted in compliance with all applicable laws of the State of Oklahoma. Refer to Findings of Fact No. 1, No. 2, and No. 3.

3) The Board finds and determines, as a matter of law and fact, that the Arkansas River at the point of effluent discharge, is a perennial stream, as defined in Appendix C of the 1979 Oklahoma Water Quality Standards (refer to Finding of Fact No. 4). The Board further finds that, according to the 1979 Oklahoma Water Quality Standards, Section 8.1, in the case of a perennial stream, the mixing zone extends downstream a distance equivalent to thirteen (13) times the width of the water at the point of effluent discharge, and that water quality in the mixing zone may be unsuitable for certain beneficial uses, and further that where overlapping mixing zones due to multiple outfalls occur, the total length of the mixing zone will be equal to the sum of the lengths of the individual mixing zones.

4) The Board finds and determines, as a matter of law and fact, that the receiving water at the end of the mixing zone of discharges, when said discharges are in compliance with the instant draft permit effluent limitations, standards, conditions, and compliance schedules, will meet the 1979 Oklahoma Water Quality Standards for the Arkansas River segment wherein the end of the mixing zone lies (refer to Findings of Fact No. 4, No. 5, and No. 6). In this regard, the Board finds and determines that the evidence presented by Protestants was insufficient to show that pollution to waters of the state would occur if effluent from the proposed coal slurry pipeline dewatering plant was discharged, in accord with the parameters and conditions set forth in the draft permit, into the Arkansas River, at a location more specifically described in the caption above (refer to Finding of Fact No. 7). The Board further finds and determines, based on information submitted by Applicant and information otherwise available as public record at the Board, that sufficient data was available to Board staff to evaluate Applicant's proposed process and prepare the instant draft waste disposal permit, therefore, the request for a deferral of action set forth in Board's Exhibit F is denied (refer to Finding of Fact No. 7).

5) The Board concludes, as a matter of law and fact, and for all the reasons and upon all the grounds found and stated within this order, that effluent discharges from the proposed coal slurry pipeline dewatering plant, made in accord with the instant draft permit, will not be deemed pollution, as contemplated and defined by 82 O.S. 1981, §926.1(1). Refer to 82 O.S. 1981, §926.6(c) and Findings of Fact No. 4 and No. 6.

ORDER

IT IS THEREFORE ORDERED AND ADJUDGED BY THE OKLAHOMA WATER RESOURCES BOARD upon consideration of all premises hereof, that application No. WD-81-016 in the name of ETSI Pipeline Project, a joint venture, for a waste disposal permit be and the same is hereby approved, and that the waste disposal permit, drafted by the Water Quality

Division of the Oklahoma Water Resources Board be, and the same is hereby issued to ETSI Pipeline Company, A Joint Venture, with wastewater to be discharged into the Arkansas River at a point located in the NW¼ of the NW¼ of the NW¼, Section 22, T23N, R3EIM, Pawnee County, Oklahoma.

IT IS FURTHER ORDERED, that the Applicant shall comply with all permit conditions, compliance schedules, monitoring requirements, effluent limitations, and management requirements and responsibilities, as set forth in the permit hereby issued, and all applicable laws of the State of Oklahoma and Rules and Regulations of the Board.

DONE this 8th day of February, 1983, in regular and open session of the Oklahoma Water Resources Board.

OKLAHOMA WATER RESOURCES BOARD

Earl Walker
Gerald E. Borelli, Chairman

ATTEST:

L. L. Males, Secretary

(SEAL)

REVIEWED BY:

Dean Couch

I.D. NO 59000180

OKLAHOMA WATER RESOURCES BOARD

WASTE DISPOSAL PERMIT

In compliance with Title 82 O.S. 1981, §926 et seq., as amended, and the Rules and Regulations of the Oklahoma Water Resources Board,

ETSI PIPELINE PROJECT, A JOINT VENTURE
ETSI SOONER DEWATERING PLANT
P.O. Box 7598
San Francisco, California 94120

is authorized to discharge from a facility located within the boundaries of the Oklahoma Gas and Electric Company Sooner Generating Station in the NE¼, SW¼, NE¼, Section 23, Township 23N, Range 2EIM, Noble County, Oklahoma

to receiving waters named the Arkansas River

whose beneficial uses established under Oklahoma Water Quality Standards are Emergency Public and Private Water Supply, Fish and Wildlife Propagation, Agriculture, Municipal and Industrial Cooling Water, Primary Body Contact Recreation, Secondary Body Contact Recreation, and Aesthetics,

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit shall become effective on February 8, 1983.

This permit and the authorization to discharge shall expire at midnight, on February 7, 1988.

This is to certify that the proposed waste discharge(s) described in this permit meet(s) the requirements of Oklahoma's Water Quality Standards.

Approved by the Oklahoma Water Resources Board on February 8, 1983.

James R. Barnett, Executive Director

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning the effective date and lasting through the beginning of Phase II (Part III) of the pipeline project, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 001.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, batching water, excess delivery water, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Flow (MGD)	Report	Report	N/A	N/A	Continuous	Record
Temperature	N/A	90°F (32.2°C)	N/A	N/A	Continuous	Record
BOD_5	1,035.8 lb/d	2,071.6 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Suspended Solids	1,035.8 lb/d	2,071.6 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Dissolved Solids (measured)	69,055 lb/d	86,319 lb/d	2,000 mg/L	2,500 mg/L	1/week	Grab
Chlorides	Report	Report	Report	500 mg/L	1/week	Grab
Sulfates	Report	Report	Report	1,800 mg/L	1/week	Grab
Oil and Grease	517.9 lb/d	863.2 lb/d	15.0 mg/L	25.0 mg/L	2/month	Grab
Specific Conductance*	N/A	N/A	N/A	3,500 µmhos	1/day	Instantaneous

*If the specific conductance limit is exceeded, the discharge shall be discontinued until corrections are made and the discharge complies with the limit.

NOTE: See Part III for Additional Requirements

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored continuously.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #001: NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning the effective date and lasting through the beginning of Phase II (Part III) of the pipeline project, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 01A.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS*	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Aluminum (Total)	N/A	Report	N/A	Report	2/month	Grab
Arsenic (Total)	N/A	5.74 lb/d	N/A	0.20 mg/L	2/month	Grab
Barium (Total)	N/A	143.4 lb/d	N/A	5.0 mg/L	2/month	Grab
Cadmium	N/A	0.86 lb/d	N/A	0.03 mg/L	2/month	Grab
Cyanide (Total)	N/A	0.72 lb/d	N/A	0.025 mg/L	2/month	Grab
Chromium (Total)	N/A	2.87 lb/d	N/A	0.10 mg/L	2/month	Grab
Copper (Total)	N/A	2.87 lb/d	N/A	0.10 mg/L	2/month	Grab
Iron (Total)	N/A	Report	N/A	Report	2/month	Grab
Mercury (Total)	N/A	0.143 lb/d	N/A	0.005 mg/L	2/month	Grab
Nickel (Total)	N/A	28.7 lb/d	N/A	1.0 mg/L	2/month	Grab
Lead (Total)	N/A	2.9 lb/d	N/A	0.1 mg/L	2/month	Grab
Selenium (Total)	N/A	1.434 lb/d	N/A	0.050 mg/L	2/month	Grab
Zinc (Total)	N/A	28.67 lb/d	N/A	1.00 mg/L	2/month	Grab

*The permittee may request a review of these parameters for possible deletion after the suspected sources of the pollutants (i.e., excluding batching water and excess delivery water) have been monitored for a period of one year.

NOTE: See Part III for Additional Requirements

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #01A: Prior to mixing with batching water and/or excess delivery water, in the NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3LIM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning with Phase II (Part III) of the pipeline project and lasting through the beginning of Phase III of the pipeline project, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 001.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, batching water, excess delivery water, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Flow (MGD)	Report	Report	N/A	N/A	Continuous	Record
Temperature	N/A	90°F (32.2°C)	N/A	N/A	Continuous	Record
BOD_5	1,138.4 lb/d	2,276.8 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Suspended Solids	1,138.4 lb/d	2,276.8 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Dissolved Solids (measured)	75,894 lb/d	94,868 lb/d	2,000 mg/L	2,500 mg/L	1/week	Grab
Chlorides	Report	Report	Report	500 mg/L	1/week	Grab
Sulfates	Report	Report	Report	1,800 mg/L	1/week	Grab
Oil and Grease	569.2 lb/d	948.7 lb/d	15.0 mg/L	25.0 mg/L	2/month	Grab
Specific Conductance*	N/A	N/A	N/A	3,500 μmhos	1/day	Instantaneous

*If the specific conductance limit is exceeded, the discharge shall be discontinued until corrections are made and the discharge complies with the limit.

NOTE: See Part III for Additional Requirements

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored continuously.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #001: NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning with Phase II (Part III) of the pipeline project and lasting through the beginning of Phase III of the pipeline project, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 01A.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS*	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Aluminum (Total)	N/A	Report	N/A	Report	2/month	Grab
Arsenic (Total)	N/A	6.42 lb/d	N/A	0.20 mg/L	2/month	Grab
Barium (Total)	N/A	160.5 lb/d	N/A	5.0 mg/L	2/month	Grab
Cadmium	N/A	0.96 lb/d	N/A	0.03 mg/L	2/month	Grab
Cyanide (Total)	N/A	0.803 lb/d	N/A	0.025 mg/L	2/month	Grab
Chromium (Total)	N/A	3.21 lb/d	N/A	0.10 mg/L	2/month	Grab
Copper (Total)	N/A	3.21 lb/d	N/A	0.10 mg/L	2/month	Grab
Iron (Total)	N/A	Report	N/A	Report	2/month	Grab
Mercury (Total)	N/A	0.160 lb/d	N/A	0.005 mg/L	2/month	Grab
Nickel (Total)	N/A	32.1 lb/d	N/A	1.0 mg/L	2/month	Grab
Lead (Total)	N/A	3.2 lb/d	N/A	0.1 mg/L	2/month	Grab
Selenium (Total)	N/A	1.605 lb/d	N/A	0.050 mg/L	2/month	Grab
Zinc (Total)	N/A	32.11 lb/d	N/A	1.00 mg/L	2/month	Grab

*The permittee may request a review of these parameters for possible deletion after the suspected sources of the pollutants (i.e., excluding batching water and excess delivery water) have been monitored for a period of one year.

NOTE: See Part III for Additional Requirements

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #01A: Prior to mixing with batching water and/or excess delivery water, in the NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3E IM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning with Phase III (Part III) of the pipeline project and lasting through the beginning of Phase IV of the pipeline project, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 001.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, batching water, excess delivery water, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Flow (MGD)	Report	Report	N/A	N/A	Continuous	Record
Temperature	N/A	90°F (32.2°C)	N/A	N/A	Continuous	Record
BOD_5	773.1 lb/d	1,546.2 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Suspended Solids	773.1 lb/d	1,546.2 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Dissolved Solids (measured)	51,541 lb/d	64,426 lb/d	2,000 mg/L	2,500 mg/L	1/week	Grab
Chlorides	Report	Report	Report	500 mg/L	1/week	Grab
Sulfates	Report	Report	Report	1,800 mg/L	1/week	Grab
Oil and Grease	306.6 lb/d	644.3 lb/d	15.0 mg/L	25.0 mg/L	2/month	Grab
Specific Conductance*	N/A	N/A	N/A	3,500 µmhos	1/day	Instantaneous

*If the specific conductance limit is exceeded, the discharge shall be discontinued until corrections are made and the discharge complies with the limit.

NOTE: See Part III for Additional Requirements

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored continuously.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #001: NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning with Phase III (Part III) of the pipeline project and lasting through the beginning of Phase IV of the pipeline project, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 01A.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS*	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Aluminum (Total)	N/A	Report	N/A	Report	2/month	Grab
Arsenic (Total)	N/A	4.89 lb/d	N/A	0.20 mg/L	2/month	Grab
Barium (Total)	N/A	122.2 lb/d	N/A	5.0 mg/L	2/month	Grab
Cadmium	N/A	0.73 lb/d	N/A	0.03 mg/L	2/month	Grab
Cyanide (Total)	N/A	0.611 lb/d	N/A	0.025 mg/L	2/month	Grab
Chromium (Total)	N/A	2.44 lb/d	N/A	0.10 mg/L	2/month	Grab
Copper (Total)	N/A	2.44 lb/d	N/A	0.10 mg/L	2/month	Grab
Iron (Total)	N/A	Report	N/A	Report	2/month	Grab
Mercury (Total)	N/A	0.122 lb/d	N/A	0.005 mg/L	2/month	Grab
Nickel (Total)	N/A	24.4 lb/d	N/A	1.0 mg/L	2/month	Grab
Lead (Total)	N/A	2.4 lb/d	N/A	0.1 mg/L	2/month	Grab
Selenium (Total)	N/A	1.222 lb/d	N/A	0.050 mg/L	2/month	Grab
Zinc (Total)	N/A	24.44 lb/d	N/A	1.00 mg/L	2/month	Grab

*The permittee may request a review of these parameters for possible deletion after the suspected sources of the pollutants (i.e., excluding batching water and excess delivery water) have been monitored for a period of one year.

NOTE: See Part III for Additional Requirements

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #01A: Prior to mixing with batching water and/or excess delivery water, in the NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning with Phase IV (Part III) of the pipeline project and lasting through the expiration date, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 001.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, batching water, excess delivery water, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Flow (MGD)	Report	Report	N/A	N/A	Continuous	Record
Temperature	N/A	90°F (32.2°C)	N/A	N/A	Continuous	Record
BOD_5	410.3 lb/d	820.6 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Suspended Solids	410.3 lb/d	820.6 lb/d	30.0 mg/L	60.0 mg/L	1/week	Grab
Total Dissolved Solids (measured)	27,355 lb/d	34,194 lb/d	2,000 mg/L	2,500 mg/L	1/week	Grab
Chlorides	Report	Report	Report	500 mg/L	1/week	Grab
Sulfates	Report	Report	Report	1,800 mg/L	1/week	Grab
Oil and Grease	205.2 lb/d	341.9 lb/d	15.0 mg/L	25.0 mg/L	2/month	Grab
Specific Conductance*	N/A	N/A	N/A	3,500 µmhos	1/day	Instantaneous

*If the specific conductance limit is exceeded, the discharge shall be discontinued until corrections are made and the discharge complies with the limit.

(Continued on Page 9)

NOTE: See Part III for Additional Requirements

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored continuously.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #001: NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning with Phase IV (Part III) of the pipeline project and lasting through the expiration date, the permittee shall monitor the discharge in accordance with the following schedule, and report the results to the Oklahoma Water Resources Board on or before the 28th day of January, April, July and October of each year.

The permittee is authorized to discharge from outfall serial number 001.

The discharge consists of wastewater from a coal slurry pipeline dewatering plant, including process water, boiler blowdown, and treated sanitary wastewater.

EFFLUENT CHARACTERISTICS	DISCHARGE LIMITATIONS				MONITORING REQUIREMENTS	
PARAMETERS*	AVERAGE LOADING	MAXIMUM LOADING	AVERAGE CONCENTRATION	MAXIMUM ALLOWABLE CONCENTRATION	MEASUREMENT FREQUENCY	SAMPLE TYPE
Aluminum (Total)	N/A	Report	N/A	Report	2/month	Grab
Arsenic (Total)	N/A	2.74 lb/d	N/A	0.20 mg/L	2/month	Grab
Barium (Total)	N/A	68.4 lb/d	N/A	5.0 mg/L	2/month	Grab
Cadmium	N/A	0.41 lb/d	N/A	0.03 mg/L	2/month	Grab
Cyanide (Total)	N/A	0.342 lb/d	N/A	0.025 mg/L	2/month	Grab
Chromium (Total)	N/A	1.37 lb/d	N/A	0.10 mg/L	2/month	Grab
Copper (Total)	N/A	1.37 lb/d	N/A	0.10 mg/L	2/month	Grab
Iron (Total)	N/A	Report	N/A	Report	2/month	Grab
Mercury (Total)	N/A	0.068 lb/d	N/A	0.005 mg/L	2/month	Grab
Nickel (Total)	N/A	13.7 lb/d	N/A	1.0 mg/L	2/month	Grab
Lead (Total)	N/A	1.4 lb/d	N/A	0.1 mg/L	2/month	Grab
Selenium (Total)	N/A	0.684 lb/d	N/A	0.050 mg/L	2/month	Grab
Zinc (Total)	N/A	13.68 lb/d	N/A	1.00 mg/L	2/month	Grab

*The permittee may request a review of these parameters for possible deletion after the suspected sources of the pollutants (i.e., excluding batching water and excess delivery water) have been monitored for a period of one year.

NOTE: See Part III for Additional Requirements

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Outfall #001: NW¼, NW¼, NW¼, Section 22, Township 23N, Range 3EIM, Pawnee County, Oklahoma.

A. MANAGEMENT REQUIREMENTS

1. Change in Discharge

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit. Any anticipated facility expansions, production increases, process modifications and/or treatment changes which will result in new, different, or increased discharges of pollutants must be reported by the submission of a new Waste Disposal Application or, if such changes will not violate the effluent limitations specified in this permit, by notice to the Oklahoma Water Resources Board of such changes. Following such notice, the permit may be modified to specify and limit any pollutants not previously limited.

2. Noncompliance Notification

If, for any reason, the permittee does not comply with or will be unable to comply with any daily maximum effluent limitation specified in this permit, the permittee shall provide the Oklahoma Water Resources Board with the following information, in writing, within five (5) days of becoming aware of such condition:

a. A description of the discharge and cause of noncompliance; and

b. The period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the noncompliance is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the noncomplying discharge.

3. Facilities Operation

The permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

4. Spill Notification

Whenever a spill or accidental discharge occurs, which may or may tend to cause pollution, the Oklahoma Water Resources Board shall be notified immediately, such notification to be followed by a letter of explanation, to be received within one (1) week of the spill or accidental discharge.

5. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a State approved industrial waste disposal site or to a company for recycling.

B. RESPONSIBILITIES

1. Right of Entry

The permittee shall allow any staff member of the Oklahoma Water Resources Board, upon presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to any copy and records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any discharge of pollutants; and

c. To enter upon the permittee's premises to examine and inspect any retention facilities or disposal system covered under the terms of this permit.

2. Transfer of Ownership or Control

In the event of any change in control or ownership of facilities from which the authorized discharges emanate and/or whose waste disposal system is regulated under this permit, the permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the Oklahoma Water Resources Board.

3. Permit Modification

This permit may be modified, suspended, or revoked in whole or in part during its term as provided under Board Rules and Regulations.

PART III

1. All laboratory analyses must be performed by a laboratory certified by the Oklahoma Water Resources Board for the parameters specified in Parts I and II of this permit.

2. All samples should be collected during normal operation and be collected in such a manner as to be representative of the discharge at the time of collection.

3. If the permittee samples any permit parameter more frequently than required, then all sample results must be included in any calculations used to determine the values reported on the Self Monitoring Reports (SMR).

4. Flow measurements should be made at the time of sample collection. The average and the maximum flow rates during the month shall be reported on the Self Monitoring Report Form (SMR) whether numerical limitations are given or not.

5. Development of the ETSI project will proceed in four phases. Each of the phases is defined by the number of dewatering plants on-line as shown below:

Phase	Date	Facilities
I	1/85	Sooner and Muskogee, Oklahoma
II	10/85	White Bluff, Arkansas
III	1/86	Independence, Arkansas
IV	4/86	Pryor, Oklahoma, and Cypress Bend, Arkansas

PART IV

This permit is in all respects subject to compliance with and actions under any and all applicable and relevant terms, conditions, provisions and requirements of the laws of the State of Oklahoma; the Oklahoma Water Resources Board Rules, Regulations and Modes of Procedure; and Oklahoma's Water Quality Standards. The absence of any express reference within this permit to any particular statutory requirement, rule(s), regulation(s), or standard(s) shall in no respect be deemed or construed to exempt or preclude the application of such requirement, rule(s), regulation(s), or standard(s) to this permit or the permittee. By Board approval, grant and issuance of this permit, permittee acknowledges receipt of a true, correct and current copy of Board's rules, regulations and standards.

EXHIBIT IV

ETSI "WINDOW" PROGRAM

From 1862 to 1902, the Congress of the United States passed scores of statutes granting rights-of-way to individual railroad companies. The attached summary notes eight separate Acts of Congress passed allowing railroads to acquire title to certain lands. ETSI subsequently sought to cross underneath these lands by means of its "window" program.

Act of 1882. "The Union Pacific Railroad Company Act." 12 Stat. 489. "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes." The statute granted a right-of-way through public lands, granted lands to the railroad in alternate sections, and extinguished Indian titles to all lands.

Act of 1863. 12 Stat. 772. "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State." The land grant to Kansas was in turn passed to the Atchison, Topeka, and Santa Fe Railroad for construction of its route through Kansas.

Act of 1875. 18 Stat. 482. "An act granting railroads the right of way through public lands of the United States." Any duly organized railroad was granted a right-of-way through the public lands of a width of 200 feet. Railroads were also allowed to take material, earth, stone and timber from adjacent public lands for purposes of constructing the railroad. If the railroad crossed private lands, Congress authorized the condemnation of such land either through the means specified in the second Union Pacific Railroad Act of 1864, 13 Stat. 357, or by the manner provided by the relevant Territory.

Act of 1884. 23 Stat. 73. "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company and for other purposes." The statute granted the railroad a 100 foot right-of-way and authorized it to condemn Indian land in its path.

Acts of 1887. 24 Stat. 419 and 24 Stat. 446. Two statutes in 1887 were the source of the two railroad rights-of-way in Oklahoma identified in the ETSI summary. The first is "An Act to authorize the Fort Worth and Denver City Railway Company to construct and operate a railway through the Indian Territory, and for other purposes." The second is "An act to grant the right of way through the Indian Territory to the Chicago, Kansas, and Nebraska Railway and for other purposes." Both statutes granted the identified railroads a 100 foot right-of-way and authorized the railroads to condemn Indian land in its path.

Acts of 1893. 27 Stat. 487 granted rights-of-way 100 feet wide across the Indian Territory to The Kansas City, Pittsburgh and Gulf Railroad Company, along with power to condemn Indian lands in the path of the railroad.

Act of 1899. 30 Stat. 1368 granted rights-of-way 100 feet wide across the Indian Territory to The Fort Smith and Western Railroad Company. Also granted the power to condemn Indian lands in the path of the railroad.

Act of 1902. 32 Stat. 43. "An act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company and for other purposes." The act grants a 100 foot right-of-way and the power to condemn adjacent land for purposes of constructing stations, water towers, etc. In addition, the liberal condemnation powers are extended to any railway company which previously was granted a right-of-way through Indian Territory.

Attachment A

SUMMARY OF RAILROAD RIGHT OF WAY TITLE INTERESTS--ETSI PROJECT

		How Railroad Initially Acquired Title									
Railroad	No. of Xings	Act of 1862	Act of 1863	Act of 1875	Act of 1884	Act of 1887	Act of 1893	Act of 1899	Act of 1902	Condemnation	Negotiated R/W Deeds, Easements, Etc.
Wyoming (4 Crossings)											
C&NW	2			2							
UP	1	1									
BN	1			1							
Colorado (3 Crossings)											
BN	2			2							
UP	1										1
Nebraska (5 Crossings)											
BN	3			3							
UP	2	1								1	
Kansas (29 Crossings)											
BN	1			1							
CRI&P	6										6
UP	4	3									1
AT&SF	11		2							5	4
MP	6									2	4
SL	1										1
Oklahoma (16 Crossings)											
CRI&P	1										1
AT&SF	4				1			1	1	1	
SL&SF	4					1					3
KATY	2								1		1
KCS	2						1	1			
MP	3					1			1		1

Attachment A (cont.)

SUMMARY OF RAILROAD RIGHT OF WAY TITLE INTERESTS--ETSI PROJECT (cont.)

		How Railroad Initially Acquired Title									
Railroad	No. of Crossings	Act of 1862	Act of 1863	Act of 1875	Act of 1884	Act of 1887	Act of 1893	Act of 1899	Act of 1902	Condemnation	Negotiated (R/W Deeds, Easements, Etc.)
Arkansas (11 Crossings)											
SL&SF	1										1
CRI&P	4										4
MP	5										5
SL&SW	1										1
Louisiana (2 Crossings)											
MP	2										2
TOTAL	* 70										

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* The original ETSI routes (i.e. through Nebraska and an alternate through Colorado) involved 70 crossings, 65 of which required litigation.

EXHIBIT V

ETSI PIPELINE PROJECT'S EXPERIENCE
STATE-BY-STATE REVIEW

The ETSI Project, as currently proposed, traverses six states. The following situation applies to the respective states:

South Dakota: ETSI's water source in South Dakota comes from the Oahe Reservoir. Some 270 miles of conventional pipeline (the West River Aqueduct) will be necessary to carry water west across the state from the Oahe Reservoir to Wyoming. Under current state statutes, ETSI may be able to condemn properties to construct the West River Aqueduct. However, a project of this nature has never tested these statutes, and in any case, an attempt to exercise such authority is certain to be challenged. The route of the West River Aqueduct traverses land held by over 150 individual landowners. To date, ETSI has acquired the necessary rights-of-way from over 70% of these owners. (See Exhibit 1) Active negotiations are underway with the remaining landowners. One of these, the Chicago and Northwestern Railroad (C&NW), has a right-of-way that intersects with the proposed route of the West River Aqueduct. The railroad has firmly refused to grant a crossing permit to the water pipeline for the one crossing necessary in South Dakota. Governor Janklow, on ETSI's behalf, appealed to the chief executive officer of the C&NW to permit the pipeline crossing, but to no avail.

During the current session of the South Dakota Legislature, proposed legislation providing a "quick take" provision to acquire rights-of-way from all landowners along the proposed route of the West River Aqueduct was defeated by the South Dakota House. However, on March 4, 1983, the Legislature did enact legislation providing this "quick take" remedy against other entities operating in South Dakota which already possess the power to use eminent domain authority, specifically railroads and utilities. Governor Janklow is expected to sign the legislation, thus permitting the West River Aqueduct line to at least cross the C&NW right-of-way. The C&NW has already indicated that it will challenge the constitutionality of this legislation when it becomes law.

Wyoming: Existing State statutes provided eminent domain for coal pipelines. The main slurry line in Wyoming requires rights-of-way from 214 landowners. 203 of these have been acquired through negotiations and one is in the final stages of negotiation. Condemnation proceedings were filed against the remaining ten owners. All but two have settled with ETSI or are in the process of doing so. These remaining two cases have required full condemnation actions. Permits to cross railroads in Wyoming were originally acquired by the "window" process.

Having once established the "window system" and the right to condemn, the railroads have permitted crossing for the pipeline to be acquired.

Colorado: The ETSI Project is routed through Colorado only because of opposition in Nebraska. (See below) The Colorado route adds approximately 35 miles at a cost of about $50,000,000 to the project. Colorado does not provide a clear right eminent domain for slurry pipelines; however, we were able to negotiate all required rights-of-way by paying above average prices. Normally rights-of-way at the locations traversed in Colorado would cost $500 to $600 per acre. ETSI's average cost was closer to $1,000 per acre. Two railroad crossings in Colorado were acquired under threat of litigation, using the "window"-approach.

Kansas: Unsuccessful efforts were made to pass state eminent domain legislation in Kansas under four legislative sessions. The last effort in 1979 produced a so-called agreement with the railroads that they would not deny crossing permits if ETSI would drop its efforts to obtain eminent domain. The real reason they agreed to this, however, was because under Kansas law the majority of their rights-of-way were easement rights only. Even with this agreement, we have had to continue extensive negotiations and discussion to obtain crossing rights. There are 18 railroad crossings along the current route. With respect to private rights-of-way, we have acquired all of the Kansas ownerships, but to provide a continuous rights-of-way considerable rerouting was required, resulting in more than three miles of additional pipeline. That's a minimum of $3,000,000.

Oklahoma: In 1977, the Oklahoma Legislature, adopted legislation creating the right of eminent domain for coal pipelines. The Oklahoma law established an elaborate licensing process for eminent domain authority under the jurisdiction of the Oklahoma Corporation Commission. Consequently, ETSI has not been able to use eminent domain in Oklahoma and efforts to the necessary Corporation Commission license have been underway for about two years. The Oklahoma Railway Committee and the United Transportation Union intervened in opposition to the license, and on six occasions moved for continuance of the proceeding. The Oklahoma Railway Committee (ORC) is made up of the Burlington Northern, Santa Fe, Missouri Pacific, KATY, and Kansas City Southern Railroads. After 18 months of procedural delays by the ORC, a hearing was held before the Oklahoma Corporation Commission on February 8, 1983. Proposed findings and orders were submitted to the Commission on February 25, 1983 and the matter is still pending.

As part of its effort to secure early action by the Oklahoma Corporation Commission, ETSI found it necessary to petition the Oklahoma Supreme Court to disqualify a newly appointed commissioner for a claimed conflict of interest. The State Supreme Court agreed with ETSI's position and for the first time in the history of Oklahoma, a commissioner was barred from considering a pending matter. Because of the lengthy and burdensome discovery attempted by the Oklahoma Railway Committee, ETSI was forced to secure a protective order from the Oklahoma Corporation Commission to protect project economics and its commercial contacts from discovery by its rail competitors.

Fortunately, ETSI did have support from four intervening major Oklahoma utilities. Oklahoma Gas & Electric, Public Service Company of Oklahoma, Grand River Dam Authority and Western Farmers Electric Cooperative all testified in support of the ETSI license. In addition to these utilities, the Plumbers and Pipefitters Local Union No. 798 of the AFL-CIO also intervened in support of the petition.

ETSI is confident of favorable action by the Oklahoma Corporation Commission now that the case has been heard and proposed findings and orders submitted. However, the railroad opposition has vowed to appeal a favorable decision to the Oklahoma Supreme Court. The present docket before the State Supreme Court leads ETSI's legal advisors to believe it will take up to one and a half years for the matter to be disposed of by the Court. At present, ETSI has negotiated 89 percent of the Oklahoma rights-of-way. To obtain the remaining 11 percent, without eminent domain or the threat thereof, will be extremely costly. Fifteen railroad crossings were acquired in Oklahoma by litigation and the "window" process.

Arkansas: Based on the Arkansas Attorney General's opinion, coal slurry pipelines have the right of eminent domain. The statute, however, was never tested until recently. A selected test condemnation case was filed last year, and after a favorable lower court approval, the case was appealed to the Arkansas Supreme Court. Just recently the Supreme Court affirmed the lower court decision by a 4/3 majority. It is now assumed that we can acquire the remaining 25 percent of the ETSI right-of-way in Arkansas using eminent domain if necessary. The railroad situation in Arkansas is the same as other states. We previously acquired all crossings via the "window" process. New crossings were required, however, due to relocation of the pipeline. We currently need three crossings, one of which (Burlington Northern) is under litigation.

Louisiana: ETSI's original route into Louisiana required two railroad crossings which were acquired through litigation in 1976 and 1977, during the use of ETSI's "window" process. In 1977 an eminent domain law for coal pipelines was enacted by the Louisiana State Legislature. No condemnation proceedings have been filed against Louisiana landowners under the 1977 state statute primarily because plans call for dewatered coal slurry to be moved by barge down the Mississippi River to powerplants in that state.

Nebraska: Initially, ETSI planned to cross the State of Nebraska. During the 1976 and 1977 legislative sessions, ETSI made efforts to secure passage of a broad state eminent domain bill for coal pipelines in the State of Nebraska. In both instances, ETSI was unsuccessful; neither time did legislation get out of legislative committees. In 1979, an attempt was made to pass a limited eminent domain bill. This effort was also defeated, not getting out of committee. From that time until this year, no effort was made to pass eminent domain legislation in Nebraska. During the current session of the Nebraska Legislature, another effort is being undertaken to enact an eminent domain bill for coal pipelines. The "window system" was employed in 1976 and 1977 to successfully acquire 5 crossings in Nebraska.

March 14, 1983

ETSI PIPELINE PROJECT

RESPONSE TO WRITTEN TESTIMONY SUBMITTED BY DR. T. O. CLAFLIN

IMPACTS ASSOCIATED WITH THE CONSTRUCTION OF THE PIPELINE

Coal slurry pipelines have environmental advantages over other methods of transporting coal. Pipelines are buried and do not interfere with surface activities. On the other hand, the shipment of coal by unit train poses hazards of derailment and road crossing accidents, and environmental problems associated with noise and dust. As a general rule pipelines are unobtrusive and environmentally benign methods of transportation. I would appreciate Dr. Claflin elaborating upon the "long lasting and severe impacts" reported in his testimony when the Final EIS on the EISI Pipeline Project stated: construction impacts along any of the pipeline right-of-way "would be generally insignificant and temporary." (EIS, Vol. 1, p. 9)

It should be acknowledged that the pipeline industry, in the course of many decades, laying hundreds of thousands of miles of pipe, has developed techniques for abating the impacts associated with pipeline construction activities. The industry has pioneered the utilization of soil erosion and sedimentation controls for steam crossings and earth disturbance mitigation techniques including reclamation, seeding and fertilizing pipeline right-of-ways.

WATER WITHDRAWALS

The National Environmental Policy Act requires that environmental assessment reports, and sometimes environmental impact statements, be filed for major pipeline projects. Volumes of reliable research data were compiled for preparation of the environmental impact statement by the U.S. Bureau of Land

Management for the ETSI Pipeline Project. This comprehensive study addresses the environmental issues related to the withdrawal of waters, and the Bureau of Land Management concluded that the ETSI Pipeline Project poses no significant impact on fish and wildlife and the use of the environment by future generations. Furthermore, ETSI's use of water will have no effect on the releases from the main-stem Missouri River reservoirs set by the Corps of Engineers as being necessary for water supply and navigation.

IMPACTS ASSOCIATED WITH DEWATERING AND DISCHARGE OF SLURRY WATERS

The potential environmental issues reported by Dr. Claflin have been recognized and extensively investigated by ETSI. In fact, ETSI invested over $15 million to build and operate a Coal Evaluation Plant using full-size equipment for coal preparation and dewatering. The ETSI Coal Evaluation Plant was employed to demonstrate the treatability of the dewatering plant's effluent to meet state and Federal discharge standards, to optimize the treatment process, and to collect data in support of state and Federal discharge permit applications for the commercial facilities.

Coal can contain a wide variety of metals. Considerable research has been conducted to determine what happens when coal and water are mixed. Discharge waters from the ETSI Coal Evaluation Plant were examined. Results showed that heavy metals were not detected in concentrations approaching the discharge standards set by Federal and state regulatory agencies for industrial water quality under the Federal Water Pollution Control Act. The concentrations of heavy metals were not appreciably different from those in the original water from the Arkansas River and satisfied the permit requirements of the Arkansas Department of Pollution Control and Ecology. These extensive investigations confirmed that discharge waters can be reused or disposed of in a safe and environmentally sound manner.

A topic of general concern at present is toxic organic compounds. Recent studies by Dr. James Moore at the University of Arkansas have indicated that no traces of the organic compounds deemed hazardous or toxic by the U.S. Environmental Protection Agency are detected in discharge waters. The results from the ETSI Coal Evaluation Plant confirmed that no detectable concentrations of the 113 organic compounds listed as priority pollutants by the U.S. Environmental Protection Agency were detected in discharge waters. This data ensures that discharge waters from commercial facilities will in no way be harmful to health or the environment.

The "probable" and unsupported presence of polynuclear aromatic hydrocarbons alluded to by Dr. Claflin was investigated in the discharge waters from the ETSI Coal Evaluation Plant. If present, the concentrations were so low that they were not detected.

It should be recognized that no corrosion inhibitors are used during the normal transportation of coal slurry. The environmental problems associated with the use of hexavalent chromium are well documented. Industry has developed and routinely employed environmentally benign alternatives for corrosion inhibition. In the ETSI Pipeline, bio-degradable corrosion inhibitors will be used, when necessary, in water plugs for batch shipments and for pipe flush water.

It would appear that Dr. Claflin is not aware of the data from the ETSI Coal Evaluation Plant. Dewatering of pipeline slurry was successful in reducing the total suspended solids concentration to less than 13 parts per million. The discharge water system employed by ETSI consists of conventional settling ponds and flocculents to remove coal particles from the water. Settling ponds will be lined with compacted clay or an approved synthetic material, and precautions will be taken to insure the containment of waters prior to discharge. Where required, ponds will be monitored to protect groundwaters.

The report by researchers at the Los Alamos National Laboratory appears interesting. If Dr. Claflin would provide references to the authors and the title of the paper, the research data will be examined to ensure that the ETSI Project makes full use of available information.

BREAKAGES, SPILLS AND OTHER OPERATING CONTINGENCIES

The two commercial coal slurry pipelines constructed in the United States have proven to be safe and have been operated without adverse environmental effects. The Black Mesa Pipeline has experienced two separate interruptions of service. The spilled coals were not removed in either case because the environmental authorities in the State of Arizona determined that to do so would have disturbed the environment more than leaving it in place, and that no damage had been done to game, fish or vegetation. Based on pipeline industry experience, the frequency of ruptures and associated spills can be reduced to a minimum with the adequate design and operation considerations. The design of the ETSI coal slurry pipeline specifies pressure alarms, automatic valve systems, emergency slurry holding tanks, real-time slurry metering systems, routine aerial reconnaissance, scheduled ground patrols and the use of heavy pipe wall thicknesses and concrete coated pipes at stream crossings.

In direct response to Dr. Claflin's concern about the dumping of flushing water, it should be noted that all water discharged from the ETSI Pipeline will meet Federal and state water discharge standards.

In summary, coal slurry pipelines can meet the standards set by Federal, state and local environmental agencies. An indication of the environmental soundness of the ETSI Project is that, after review of the technical data and environmental reports, none of the permits applied for have been denied. It should be noted that:

- coal slurry pipelines have environmental advantages over other methods for transporting coal
- treatment measures, as necessary, can be taken to upgrade water quality for reuse or for discharging to surface waters in an environmentally sound manner
- no toxic organic compounds listed as priority pollutants by the U.S. Environmental Protection Agency have been detected in discharge waters
- coal slurry is not a hazardous material and its transportation by pipeline does not constitute a threat to public safety and health.

David H France

David H. France, PH.D.
General Manager
Environmental and Regulatory
Texas Eastern Corporation

Michael F Terraso

Michael F. Terraso, PH.D.
Manager-Environmental
Texas Eastern Corporation

Senator JOHNSTON. Thank you, Mr. Doran. You heard perhaps the previous witnesses talk about take or pay provisions that would be inflicted upon the consumer.

Isn't it a fact that the coal slurry pipeline would not have those take or pay provisions, that those would be between the utility and the coal producer?

Mr. DORAN. The take or pay provisions concerning the purchase of coal is common between the utility and the coal mine, the producer of the coal. The utility needs for the major generation facility and the public obligation a promise that it has fuel over a long period of time, and it also needs assurance that it can get the fuel delivered in a proper and reasonable way.

The transportation systems of the United States, whether they be river, railroad or pipeline, have been built on the basis for the most part of minimum guarantees or assurances that the system will be used.

In terms of common carriers, we provide only the transportation service and do not sell the commodity. However, we must have the assurance that the system is going to be used, so there are minimum guarantees envisioned not only in coal slurry pipelines, but in railroad contracts, some oil pipelines, and barging operations.

Senator JOHNSTON. Mr. Doran, ETSI is subject to section 402 of the Clean Water Act, is it not?

Mr. DORAN. Yes, sir, we are.

Senator JOHNSTON. And you have built a $15 million plant in order to demonstrate the water quality that will be discharged from the ETSI pipeline?

Mr. DORAN. We did, that is correct, Senator. We constructed that plant at a cost of approximately $15 million. We operated it for 7 months. That plant was constructed on the property of Arkansas Power and Lead at Redfield, Ark. The plant included preparation equipment of commercial size, dewatering equipment of commercial size, in order that we could determine that the coal could be adequately prepared to be transported.

Senator JOHNSTON. You described it I think in your statement. The fact is that the water is cleaner?

Mr. DORAN. And we have our permits for the State of Oklahoma as well as our Arkansas, and they have certified to EPA that the discharge water from the system will meet their requirements.

Senator JOHNSTON. You heard Mr. Claflin say this may violate Oklahoma's statutes, and yet you say that you have recently been issued a permit by the State of Oklahoma to transport Missouri River water into the Arkansas River?

Mr. DORAN. We were given permits for three locations in Oklahoma on February 8 of this year.

Senator JOHNSTON. Now with respect to pipeline spills, you heard Mr. Claflin say that—I thought he was describing dioxin when he talked about coal spills because it sounded as though it was so terribly dangerous.

As a matter of fact, don't we have experience with a couple of pipeline breaks on the Black Mesa coal slurry pipeline? Don't we have that?

Mr. DORAN. Yes, we have indeed, and those experiences involved an error in the operation wherein due to——

Senator JOHNSTON. I don't care about how it happened, but what was the result?

Mr. DORAN. The result was it spilled coal slurry of a volume of approximately 200 tons out to the desert. The State of Arizona and the Interior Department made an assessment that more damage would be done to try and clean up than by the virtue of the coal there.

There was no risk to the environment or to the inhabitants, and within 6 months to a year there was no evidence that a leak had occurred, a break had occurred.

Senator JOHNSTON. You also heard Mr. Claflin talk about some chemical that was put in that was very dangerous. What was the name of that? You don't use that chemical, whatever it was?

Mr. DORAN. No. That is hexavalent chromium I believe is what he is referring to. That is not used in the industry, no.

Senator JOHNSTON. Is there anything toxic in that coal other than just regular coal? That is all it is, coal and water, isn't it?

Mr. DORAN. That's right. Dr. France, can he comment to that?

Senator JOHNSTON. Yes.

Dr. FRANCE. Mr. Chairman, the potential environmental issues and concerns associated with coal slurry pipelines have been documented and recognized by ETSI and the other potential projects. For that reason, for one of those reasons, ETSI constructed the coal evaluation plant in Arkansas at a significant cost.

The environmental objectives of the coal evaluation plant was to demonstrate full-size commercial equipment for the dewatering of coal slurry pipelines to collect data to support the preparation and filing of State and Federal environmental permits.

This considerable amount of research that was done was to investigate what happens when you mix coal and water together. The discharge waters from the ETSI coal evaluation plant have been analyzed. The results will show that there are no heavy metals that have been detected in concentrations approaching the discharge standards set by the Federal and State environmental agency. In fact, the discharge waters from the coal evaluation plant were very similar to the existing water that was taken from the Arkansas River.

Senator FORD. Can I ask, you say the water that was discharged is identical to the water taken from the Arkansas River?

Dr. FRANCE. Was very similar, Senator.

Senator FORD. Very similar; so the water that was mixed with the coal is basically or similar to that in the Arkansas River?

Mr. DORAN. Congressman, that water came from the Arkansas in this test plant, in this coal evaluation plant. The water that was used was Arkansas River water. It slurried coal. It was dewatered. It was cleaned up and returned to the Arkansas River in a State that would have left it no different than the condition of the water as it is indigenous to the Arkansas River to begin with.

Senator FORD. After it has gone through the filtering system?

Dr. FRANCE. That is correct.

Senator FORD. It didn't come out that way to me. I just wondered.

Dr. FRANCE. Let me address the issue of organic substances.

Senator JOHNSTON. Without going into detail—I think that is in the statement—it is as clean or cleaner than the Arkansas River water that came into the plant?

Dr. FRANCE. The water from the coal evaluation plant was tested for 113 organic species that are listed by the U.S. Environmental Protection Agency, and none of thse species were detected in the water discharged from the coal evaluation plant.

Senator JOHNSTON. I thank you.

Senator Warner, do you have any questions?

Senator WARNER. Yes. Thank you very much, Mr. Chairman. We are experiencing now problems with take or pay in connection with gas.

Is there any thought of using that contract mechanism through your pipeline?

Mr. DORAN. It will be different from the conventional gas take or pay as I understand it because we are not only talking about transportation there, Senator Warner, but we are also talking about gas contracts, gas and commodities, and in the sense of the transportation system that the coal slurry pipeline transportation systems will provide a transportation service. Essentially in order to build those systems there will have to be some assurance by the customer that it is going to be used. He has take or pay contracts with the storage, with the mines, and today he is giving the railroads financial assurance that he is going to use their service.

He will have to give minimum billing assurance to coal slurry pipelines if he desires their services as well. That is a traditional way in which transportation systems have been financed in the United States, and will continue to be.

Senator WARNER. Any particular kind of contracts with utilities that you sign?

Mr. DORAN. We are negotiating contracts with utilities at this moment, and they are an arms length basis, and they are give and take negotiations.

Senator WARNER. Firm prices, guarantees?

Mr. DORAN. There will be a mechanism in there whereby the utility will be able to compute his cost of service, his cost to be served by this pipeline. We will assure him of a rate at the beginning, and that rate will be adjusted by certain factors in the economy, but he will be privy to what those are and the timing under which they will be used. He will know down in the future what effect it will have, how his rates will be affected.

Senator WARNER. In the transportation in the ETSI system, will you be injecting chemicals to prevent the corrosion of the pipeline?

Mr. DORAN. No, sir, that will not be necessary.

Senator WARNER. That will not be necessary?

Mr. DORAN. That is correct.

Senator WARNER. Fair enough answer; thank you.

Senator JOHNSTON. Senator Ford.

Senator FORD. Mr. Doran, let me ask just two or three questions. When the Black Mesa spill occurred, you say there was 200 tons in that spill. How does that size compare with your pipeline that you are proposing if you have a spill?

Mr. DORAN. A spill, Senator Ford, from the ETSI pipeline in the same place as where the Black Mesa break occurred, if ETSI were operating there, would be significantly larger from the standpoint that the Black Mesa pipeline is about one third the capacity that we expect ETSI will have.

Senator FORD. How much larger would your spill be than the Black Mesa spill?

Senator FORD. It would be two and a half to three times as large under similar circumstances.

Senator FORD. So it would just be 600 tons?

Mr. DORAN. That would be correct.

Senator FORD. That would be the largest spill you could have?

Mr. DORAN. Under the similar circumstances, yes, sir.

Senator FORD. If you had a break just like they had?

Mr. DORAN. All right. I was trying to—you were comparing that.

Senator FORD. 600 tons; how much water would that be?

Mr. DORAN. About 600 tons of water.

Senator FORD. So there is a ton of water to a ton of coal?

Mr. DORAN. Virtually.

Senator FORD. I think that is what Senator Danforth said this morning, and he was questioned a little bit about that, so since you are the expert——

Senator JOHNSTON. An acre-foot.

Senator FORD. He said a ton. We are talking about a ton, and Senator Wallop is talking about acre-foot. Even this 200 tons lying there is about like shooting a fellow and saying he gets just as good treatment there as you could in a hospital.

Have any contracts been signed so far? Have you signed any contracts?

Mr. DORAN. No, sir, we have not.

Senator FORD. No contracts at all?

Mr. DORAN. That is correct.

Senator FORD. And how much money have you all spent?

Mr. DORAN. Just over a hundred million dollars.

Senator FORD. Just over a hundred million dollars, and that will be factored into your contract price, your transportation price at the time?

Mr. DORAN. Yes, sir, it will.

Senator FORD. Would you be satisfied with eminent domain over just railroad property?

Mr. DORAN. No, sir, I don't believe that would do it. With respect to ETSI, I think, Senator Ford, that ETSI could be built without Federal eminent domain. The problem, however, is the time that it would take and the financial resources that would be necessary to do that in view of the record that we have had in obtaining rights-of-way thus far without eminent domain.

The timing and the cost obviously will affect the desirability from a business standpoint of this project, and I believe without Federal eminent domain we will seriously impair this project.

Senator FORD. Well, what you are saying to me is the railroads are not your problem basically, just part of your problem. You have the farmer who objects to you coming across his land. You have the landowner, whoever he might be, objecting to you coming around his land.

Mr. DORAN. That is correct. A particular problem that I alluded to that we have run into that does not involve railroads specifically is that as we get closer to a powerplant and it is obvious that is where we are going, then it is obvious to those persons who hold property there that our need is most great to acquire a right-of-way across their property in order to get to that powerplant.

Senator **Ford**. What is the difference between easements and outright ownership?

Mr. **Doran**. You are speaking of fee ownership, and easement is just a right to be on fee property.

Senator **Ford**. So your suits you were talking about, 60 some odd suits, they were all against the railroad based on easements?

Mr. **Doran**. They would not issue us permits to cross.

Senator **Ford**. That's right, so that is easements, and that indicates something different from outright or fee ownership where you go, where people buy land, pay for it, operate it for years, and then you want to go eminent domain versus the easement.

Mr. **Doran**. The effect is the same on the pipeline.

Senator **Ford**. The effect may be the same on the pipeline, but you were able to win the easement by suits. It is going to be a little different proposition when you start going to fee simple.

Mr. **Doran**. Absolutely. Absolutely, and we experienced that in Nebraska where we rerouted into Colorado at an additional cost to the project of about $50 million, and that is, as has been pointed out here this morning, additional costs of that nature obviously are going to have to be borne by someone, and succinctly you pointed out that it is the consumer.

Senator **Ford**. That's right. The consumer is going to get stuck with this one if we are not careful.

Did you understand the legal statement here this morning that the pipeline would have liability as it relates to the discharge of water, regardless of whether they sell it or get rid of it? You expect to do that?

Mr. **Doran**. I heard Mr. Clyde make that statement, yes. That sounds appropriate to me, yes.

Senator **Ford**. You wouldn't object then if we changed the amendment that we had that failed last time in this piece of legislation?

Mr. **Doran**. I am not familiar with that in detail, Senator, but if that in fact does what we are talking about, I would not find it objectionable.

Senator **Ford**. Well, what I wanted, what some of us wanted, about half and half, I think it was split down the middle, was the pipeline retained responsibility for the water.

Mr. **Doran**. The pipeline, Senator Ford, is going to own the dewatering facility. Our customers don't want water per se. We are providing a coal transportation service. It is the method by which we do it that is unique. The byproduct of that transportation delivery system is water. Now this water can be utilized by the powerplant. It would represent about one-eighth of his water makeup requirement and his cooling system, so there would be some powerplants that will take this water and it will provide a real economic service to them and relieve their relying on local water sources for that amount of water.

To the extent that that is not done, and as we talked about earlier, Oklahoma and Arkansas have given us permission to go into surface draining for water, but that is a pipeline problem and one that we recognize.

Senator **Ford**. So I say to my colleague, it seems to me then we can go ahead and put it in legislation since you have acquiesced to that situation this morning.

Now do you have any land leased for coal? Are you producing coal?

Mr. **Doran**. No, sir, we do not.

Senator **Ford**. Do you have any subsidiaries?

Mr. **Doran**. I am the president of ETSI which is a partnership. I cannot speak for all of the partners. As to Texas Eastern, the company that employs me, we do not have any.

Senator **Ford**. You don't know anything about your partners, what land they own, what coal they might produce and that sort of thing?

Mr. **Doran**. It would be de minimis if they had any, but I don't know that. I can't speak for them.

Senator **Ford**. But we are getting to the point here that you are going to own the coal or could own the coal, put it in your pipeline, and sell it to a facility and you would be the sole owner from end to end.

Mr. **Doran**. We are going to be a common carrier providing a service from the mine mouth. The utilities currently have long-term contracts with these mines. We have got to go where they are. If they are the shipper, we have to go where they are purchasing their coal. We don't influence that, in the sense of ETSI. Now other pipelines, other facts could——

Senator **Ford**. So you are just speaking for yourself here today, not necessarily all other pipelines that might be considered for construction?

Mr. **Doran**. That is correct. Yes, sir.

Senator **Ford**. You say you are going from mine mouth?

Mr. **Doran**. Yes, sir.

Senator **Ford**. What about small operators who would like to get in on your pipeline? Aren't you excluding them?

Mr. **Doran**. No, we are not.

Senator **Ford**. Why not?

Mr. **Doran**. Because we are operating under part 1 of the Interstate Commerce Act. We cannot discriminate. Our rates must be just and reasonable and we must provide access.

Senator **Ford**. You are going to provide access to all these small operators then?

Mr. **Doran**. The pipeline is an economic entity. We as an economic entity will have to determine what rules and regulations——

Senator **Ford**. The pipeline will determine?

Mr. **Doran**. And file in its tariff with the Interstate Commerce Commission those rules and regulations that apply to the operation of this pipeline system; the Interstate Commerce Commission under part 1 of the Interstate Commerce Act has the responsibility to find as to whether those rules are reasonable, discriminatory, or whatever, and I would not for a minute tell you that every remote mine is going to be served by a pipeline just as it is not now being served by a rail, but there are means by which local, small mines will have access to pipelines such as ours. I can foresee that they have.

In the event that they didn't have, I feel that there is, that the presence of this competitive force will have an effect on railroad rates favorable to the small mine owner.

Senator FORD. How can it be that when you take a major portion—I think your pipeline is going to have 30 million tons annually, am I right? Twenty-five?

Mr. DORAN. This pipeline is designed for 30 million tons.

Senator FORD. Thirty million tons; you take 30 million tons out of railroads' income——

Mr. DORAN. That is with respect to the mines that we are going to. There may be other pipelines of lesser volume that would serve those areas. I am only speaking as to this particular pipeline which serves these very large clients.

Senator FORD. You are getting yourself involved in the whole picture. You are a separate entity. You are telling us what you are going to do and we have to pass a piece of legislation that covers all pipelines.

Mr. DORAN. I think your questions are fair and I will try to answer them the best that my experience lets me do that.

Senator FORD. What you are getting into, you are answering only what you are going to do and you can't speak for the others, and others are going to be doing something. Maybe the ideal is we don't get the others. Your coal slurry pipeline may be good for unit trains, to bring rates down, but anything less than unit trains, that is the small operator, and you are not bringing his prices down.

Mr. DORAN. This project does not deal in the area of the small operator. I agree with you there.

Senator FORD. OK, so you are saying to me that this unit does not deal with small operators, period? He's out?

Senator JOHNSTON. You're not letting him answer the question.

Mr. DORAN. There are no small operators where we are operating. These are all very large surface mines in this instance.

We have looked at other pipelines, and under circumstances where there are smaller, older mines disseminated out through an area, one of the pipelines had a gathering system designed explicitly to pick up the smaller mines because that in fact is what the area consisted of relative to the type of service that we are providing.

This pipeline, their gathering system, would be fairly extensive, but the opportunity, I think a reasonable opportunity by law has to be afforded to these people if the pipeline wants to operate as a common carrier under the laws that apply to it, Senator.

Senator FORD. I apologize.

Mr. DORAN. I am arguing to every single situation, and I'm sorry about that.

Senator FORD. I apologize to you if I wouldn't let you answer the questions, but I am getting one set of answers here for everybody, and one set of answers here for everybody is not good enough, Mr. Chairman, and I intend if you will allow me to have other pipeline proposals in to testify before this committee.

Now you are saying you are not going to deal with small operators. It is all big operators and your area has no small operators, so therefore you are just going to deal with big ones, but let's get into the collection and the mix.

The inlets are going to be very expensive so that is going to raise the price or the cost of transportation of the pipeline.

How are you going to have the mixing facility? You are going to build the mixing facility and you are going to have the testing facility and be sure you have the right quality of coal and that sort of thing. All these things are going to be added to the transportation charge as it relates to the pipeline if you are going to get into these other inlets for small operators, is that not true?

Mr. DORAN. Senator, I have been in the pipeline business about 31 years.

Senator FORD. In the coal slurry pipeline business?

Mr. DORAN. Oil business; there are gathering systems from the well that may be 30 barrels a day and 1 may be 300 barrels a day, and one is a small well compared to the other. They are all brought in by the gathering system to a central facility that you are familiar with. Those in turn, those several gathering systems are brought into a larger terminal, origin terminal locations for the pipeline, and there they move on.

I would suggest that the same logistical process would go, you go through the same logistical process here. Now as I indicate in my statement, we are the only going coal slurry pipeline project that there is in this country, and we are probably the only partnership or company that is willing to put this kind of money up to put a project together until it is clear to others that they can have a reasonable expectation of achieving a modicum of success in the construction of the facility, and this is what this legislation would help do, sir.

Senator FORD. Well, let me just say this. In your oil business you describe the collection system. I will quit, Mr. Chairman. You describe the collection system, and I have some knowledge of that.

Mr. DORAN. Yes, sir, I know.

Senator FORD. But there is no quality difference in the collection of oil. There is a quality difference in Btu of coal. There is a quality difference in sulfur. All of those things are different, and so therefore your collection system is not as simple under coal when you have a contract at the other end to deliver a big Btu equivalent, to deliver a sulfur of 0.75 or whatever it might be.

Mr. DORAN. That is correct.

Senator FORD. So the quality difference is one big difference when you start talking about the ability to collect and distribute through a pipeline.

Mr. DORAN. Yes, sir, you are absolutely correct.

Senator FORD. Thank you, Mr. Chairman.

Senator WARNER [presiding]. You used the term "common carrier" several times. In talking about contracts, are you part common, part contract, split?

Mr. DORAN. No. Under the law it is a common carrier.

Senator WARNER. You are going to be a common carrier?

Mr. DORAN. Under part 1 of the Interstate Commerce Act, Senator, it provides that a coal slurry pipeline will fall under that common carrier, yes, sir.

[Subsequent to the hearing Mr. Doran submitted the following:]

ETSI Pipeline Project, A Joint Venture
P.O. Box 2521
Houston, Texas 77252
(713) 759-3131

ETSI

March 22, 1983

Honorable James A. McClure, Chairman
Senate Energy and Natural Resources Committee
3121 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

At the recent hearing on S. 267, Dr. Tom Claflin referred to a report of the Los Alamos National Laboratory concerning trace element characterization of coal wastes. During my testimony before the Committee, I was questioned concerning this report, which I had not seen. Since the hearing, I have received and reviewed the report and literature (Exhibit 1) to which Dr. Claflin referred and would like to submit this statement in behalf of the ETSI Pipeline Project:

The specific report mentioned by Professor Claflin entitled "Trace Element Releases from Coal Slurry Waste Ponds" has been reviewed with respect to the design and operation of discharge water treatment facilities proposed by the ETSI Pipeline Project. In brief, the report provides preliminary information related to environmental concerns associated with the potential releases of heavy metals from active and abandoned coal waste ponds. The report concludes that waste ponds at two coal cleaning plants that process high sulfur coals may pose environmental problems due to high acidities and high concentrations of iron, manganese, nickel and aluminum. The authors recognize (at p.2) that the studies are incomplete.

The pond tested in the Los Alamos study include tailing ponds and disposal ponds for wastes from coal cleaning operations. At coal cleaning plants, coal refuse is produced when run-of-mine coal is crushed. The finer wastes from these cleaning activities are often deposited in coal slurry waste ponds tested in the study.

The results of the referenced study have very limited application to modern coal slurry pipeline facilities. It should be recognized that the design and function of the ETSI facilities differ significantly from those described in the report. The major difference is in the purpose of the ponds--the ponds tested by Los Alamos were used to receive the waste materials that are developed in a coal cleaning and preparation operation. Other important differences which minimize any potential release of heavy metals from ETSI facilities include:

- The coals to be transported by ETSI from Wyoming have very low sulfur contents and the tendency for latent acid generation will not occur. The sulfur contents of typical Wyoming coals are:

Jacobs Ranch coal	0.54%
North Rawhide coal	0.45%
Black Thunder coal	0.42%
Black Mesa coal	0.49%

- The discharge water treatment system proposed by ETSI is designed to treat waters after essentially all coal particles have been removed by centrifuge and filtration, using conventional settling tanks and flocculants. The waste ponds cited in the report were used to dispose of waters heavily laden with coal, refuse and soil.
- The systems employed to treat pipeline waters are dynamic. The waste disposal ponds cited in the report are static and result in significant accumulations of sediment.
- The acidity of the waters in the settling tanks proposed by ETSI will be monitored and neutralized. Sediments will be removed on a routine basis and disposed of in an environmentally sound manner approved by the U.S. Environmental Protection Agency. The report suggests that the waste ponds that were tested were not monitored and adjusted regularly.
- The settling tanks proposed by ETSI will be lined with compacted clay or an approved synthetic material to protect groundwaters. There is no indication in the report that the tested ponds were so lined.

Coal slurry pipeline developers have invested significant expenditures and efforts to verify that facilities can be operated in a safe and environmentally sound manner. ETSI invested over $15 million to build and operate a Coal Evaluation Plant using full size equipment for coal preparation and dewatering. ETSI recognized the dearth of reliable studies of heavy metals characterization and the need to examine heavy metal emissions from pipeline operations. Accordingly, a considerable body of knowledge related to concentrations and fate of heavy metals during coal slurrying activities was developed at the ETSI Coal Evaluation Plant. The results of the ETSI Evaluation Plant confirm that the concentrations of heavy metals in discharge waters and contained sediments in the settling tanks do not present an environmental problem.

The discharge water treatment system to be employed by ETSI will consist of conventional settling tanks and flocculants to remove coal particles from the pipeline water. Settling tanks will be lined with compacted clay or an approved synthetic material and precautions will be taken to ensure the containment of waters prior to discharge. Ponds will be monitored to protect groundwaters. The sludge of coal, alum and lime which accumulates at the bottom of the settling ponds will be disposed of in accordance with practices recommended and approved by the

U.S. Environmental Protection Agency for the on-site disposal of industrial solid wastes. These design specifications will eliminate any potential contamination of groundwaters.

At the ETSI Coal Evaluation Plant, over 99.9% of the coal is recovered by centrifuge and secondary dewatering operations prior to the treatment of discharge waters. Dewatering of pipeline slurry was successful in reducing the total suspended solids concentration to less than 13 parts per million. The discharge waters contained fewer total suspended solids than did the original water from the Arkansas River and satisfied all environmental standards for discharge into surface watercourses. Analyses of the heavy metal concentrations in both the discharge waters and the original Arkansas River water are compared in Exhibit 2.

Results from the ETSI Coal Evaluation Plant conclusively demonstrated that coal slurry pipelines can meet environmental standards. Discharge waters from the ETSI Coal Evaluation Plant were examined and heavy metals were not detected in concentrations approaching the discharge level set by federal and state regulations for industrial water quality under the Federal Water Pollution Control Act. In fact, concentrations of heavy metals were not appreciably different from those in the original Arkansas River and satisfied the permit requirements of the Arkansas Department of Pollution Control and Ecology. The ETSI Coal Evaluation Plant demonstrated the ability of coal slurry pipelines to meet federal and state discharge permit applications for the commercial facilities. An indication of the environmental soundness of the ETSI Pipeline Project is that, after review of comprehensive technical data and environmental reports, none of the permits applied for have been denied.

With respect to the potential contamination of effluents from coal slurry pipelines, the minimum acute toxicity values reported by the U.S. Environmental Portection Agency are listed in Exhibit 3. Concentrations of heavy metals in discharge waters from the ETSI Coal Evaluation Plant are very low and are similar to those for the make up waters from the Arkansas River, and pose no toxic hazard to ecological systems or human health. The discharge severity of the ETSI waters was calculated using the methodology cited in the Los Alamos report and is observed to be significantly less than those reported for acidic waters in coal waste ponds.

Published accounts of the research at the Los Alamos National Laboratory have been examined to ensure that the ETSI Pipeline Project made full use of available technical information. We have determined that the preliminary findings by Los Alamos National Laboratory are limited to coal cleaning plants and do not impact the ETSI Pipeline Project. The more recent investigations at the ETSI Coal Evaluation Plant have confirmed the coal slurry pipeline activities can be conducted in a safe and environmentally sound manner.

Thank you for this opportunity to respond to this important environmental question. If any additional information or explanation would be helpful to you and your Committee, we will gladly provide it to you.

Sincerely,

Paul G. Doran

Paul G. Doran
President, ETSI

cc: Honorable J. Bennett Johnston
Honorable Wendell H. Ford

EXHIBIT 1: LITERATURE REFERENCES

1. "Trace Element Characterization of Coal Wastes - First Annual Report"
   E. M. Wewerka and J. M. Williams
   Los Alamos National Laboratory report LA-6835-PR (March 1978)

2. "Trace Element Characterization of Coal Wastes - Second Annual Progress Report"
   E. M. Wewerka, J. M. Williams, N. E. Vanderbough, A. W. Harmon, P. Wagner, P. L. Wanek, and J. D. Olsen
   Los Alamos National Laboratory report LA-7360-PR (July 1978)

3. "Trace Element Characterization of Coal Wastes - Third Annual Progress Report"
   E. M. Wewerka, J. M. Williams, L. E. Wangen, J. P. Bertino, P. L. Wanek, J. D. Olsen, E. F. Thode, and P. Wagner
   Los Alamos National Laboratory report LA-7831-PR (June 1979)

4. "Trace Element Characterization of Coal Wastes - Fourth Annual Progress Report"
   J. M. Williams, J. P. Bertino, M. M. Jones, P. Wagner, P. L. Wanek, L. E. Wangen, and E. M. Wewerka
   Los Alamos National Laboratory report LA-8275-PR (April 1981)

5. "Trace Element Characterization of Coal Wastes - Fifth Annual Report"
   R. C. Heaton, L. E. Wangen, P. L. Wanek, J. M. Williams, M. M. Jones, A. M. Nyitray, P. Wagner, and J. P. Bertino
   Los Alamos National Laboratory report LA-8826-PR (May 1981)

6. "Trace Element Releases from Coal Slurry Waste Ponds"
   R. C. Heaton, A. M. Nyitray, J. M. Williams, and P. Wagner
   Los Alamos National Laboratory report LA-9228-MS (May 1982)

EXHIBIT 2: HEAVY METAL CONCENTRATIONS (parts per billion)

Metal	ETSI Coal Evaluation Plant Water Discharge (average)	Original Input Water from Arkansas River	Safe Drinking Water Act Maximum Contaminant Levels		Effluent Limits	
			Primary	Secondary	Arkansas	Oklahoma
Aluminum	Less than 20	486				
Arsenic	Not detected	Less than 2	50		50	200
Barium	Not detected	Less than 74	1000		5000	No limit
Boron	59	144			1000	1000
Cadmium	5	1.8	10		20	30
Chromium	5	Less than 3.4	50		500	100
Cobalt	14	7			No limit	1000
Copper	6	7.2		1000	200	100
Iron	535	814				
Lead	38	15.4	50		1000	200
Manganese	87	28		50	5	5
Mercury	Less than 0.2	Less than 0.32	2		800	100
Nickel	67	15			20	50
Selenium	Less than 20	20	10		100	100
Silver	2	1.6	50		500	1000
Zinc	97	16		5000		

EXHIBIT 3: CALCULATED DISCHARGE SEVERITIES

Metal	Minimum Acute Toxicity Effluent Value Health Effects parts per billion	Minimum Acute Toxicity Effluent Value Ecological Effects parts per billion	Calculated Discharge Severity ETSI Discharge Waters (diluted)
Aluminum	80,000	1,000	0.0002
Arsenic	250	50	not detected
Barium	5,000	2,500	not detected
Beryllium	30	55	0.00036
Boron	47,000	25,000	0.000024
Cadmium	50	1.0	0.05
Chromium	250	250	0.0002
Cobalt	750	250	0.00056
Copper	5,000	50	0.0012
Iron	1,500	2,500	0.0041
Lead	250	50	0.0076
Manganese	250	100	0.0087
Mercury	10	250	0.000008
Nickel	2,300	10	0.067
Selenium	50	25	0.008
Silver	250	5	0.004
Zinc	25,000	100	0.0097

Senator **Warner**. We will impanel the next group here, and then, Senators, I presume we will go and vote, so we will ask panel 3 to come up. Mr. Neil Sampson, executive vice president of the National Association of Conservation Districts, was unable to remain. The Chair, however, will put his statement in the record.

[The prepared statement of Mr. Sampson follows:]

NACD

STATEMENT
of the

National Association of Conservation Districts
to

Senate Committee on Energy and Natural Resources
on
S.267, Coal Pipeline Distribution Systems

by
Neil Sampson, Executive Vice President

March 14, 1983

Mr. Chairman, members of the Committee:

I am Neil Sampson, Executive Vice President of the National Association of Conservation Districts (NACD). Our association represents the nearly 3000 soil and water conservation districts and their state associations in all 50 states, Puerto Rico and the Virgin Islands. Conservation districts are responsible for developing and carrying out soil and water conservation programs within their boundaries and for providing technical assistance to over 2 1/2 million cooperating landowners.

Conservation districts have found it difficult in past years to deal effectively with utility and pipeline companies. Suggestions for site location and control of erosion during construction have been ignored. For these and other reasons, we view with concern the development of an additional entity with eminent domain powers cutting across the face of the nation.

At our national convention in February of this year, the NACD Council passed the following resolution on this subject:

COAL SLURRY PIPELINES

The NACD has several concerns relative to the proposed federal legislation to authorize federal support of coal slurry pipelines.

NACD opposes giving federal eminent domain authority.

NACD supports provisions of proposed national legislation which would preclude interference with traditional state control of water rights within their boundaries.

NACD supports provisions in proposed legislation which would require adequate controls on erosion and sediment during the period of construction of coal slurry pipelines. All construction activities should be subject to review and approval by the appropriate conservation district(s).

National Association of Conservation Districts
Rm. 730, 1025 Vermont Ave., N.W., Washington, DC 20005
Phone (202) 347-5995

Our main concerns about the bill are as follows:

1) The bill would, in effect, give coal slurry pipeline carriers the federal power of eminent domain over private lands. This is an awesome power to be given to a transportation system which has yet to prove its efficacy.

2) No attempt is made in the bill to limit construction to existing utility or transportation rights-of-way wherever possible. In fact, present statute may preclude such use. It appears to us that multiple use of existing rights-of-way would be the least disruptive and would minimize the need for additional land acquisition.

3) Acquisition of private lands by coal pipeline carriers can cause disruption of agricultural activities during the period of construction, and, unless the pipeline is buried, can disrupt surface activities in the future.

4) Federal eminent domain authority usurps traditional rights of state and local governments.

5) Although we recognize that this bill proposes not to interfere with traditional state water rights, its passage would put extreme pressures on the states to comply with the wishes of the pipeline carriers relative to water rights.

For the above reasons, we believe that S.267 is ill-advised. We respectfully request that your committee recommend non-passage of this bill.

Thank you for this opportunity to express the views of our association. We will respond to any questions you may have.

Senator **Warner**. We will start then from the top with Mr. Dempsey, president and chief executive officer, Association of American Railroads. Nice to see you.

Mr. **Dempsey**. It's good to see you. Do you want me to begin?

Senator **Warner**. Yes.

Mr. **Dempsey**. I have got a full statement which I ask be admitted to the record.

Senator **Warner**. That will be done.

STATEMENT OF WILLIAM H. DEMPSEY, PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS, WASHINGTON, D.C.

Mr. **Dempsey**. I have been here before, as you all know, and you will not be surprised to hear that my position is essentially unchanged. I don't want to be repetitive, and what I would like to do is just spend a little time touching on the principal reasons for the position that we take, and in particular, trying to focus on some of the matters that have been of interest to the committee.

Senator **Warner**. I think that would be a very helpful approach. You have patiently sat through most of the hearing today.

Mr. **Dempsey**. Right.

Senator **Warner**. You should be aware of the concerns expressed by members of this committee.

Mr. **Dempsey**. Thank you, Mr. Chairman. I begin with the reason for our concern, and I state it, of course, as a matter of private interest. It is up to the Congress and this committee to see if they can discern any public interest in it. I hope that you can.

The root fact that we deal with is the enormous, really I would say catastrophic financial impact that we see looking at this legislation.

Now there was some suggestion this morning that perhaps our statistics would be looked at with some skepticism, but I don't ask you to look at us. I ask you to look at the estimate of the Office of Technology Assessment which I think has done the most extensive study on this matter that has been done to date.

What they say is that what we can look to ultimately if the five pipelines that were on the books were actually constructed would be a loss to the rail industry of $700 million a year in net revenues, net revenues in 1971 dollars. That is more in net revenue than we made since 1971, at least as much as in any year. Now we find that we are now looking at 13 proposed pipelines, so I suppose that it is fair enough to say that that figure ought to be doubled. If it is doubled, we are simply out of business. We are out of business if it isn't doubled.

It is suggested that perhaps we can stand this strain.

Senator **Warner**. You say you are out of business?

Mr. **Dempsey**. I mean the industry obviously cannot survive a wipeout of its net operating revenue. That is perfectly obvious. We can't survive either on the premise that there will be plenty of coal to go around. That suggestion has been made from time to time. There will be a great surge in coal production, that we will not suffer any net loss.

Those projections it turns out were unduly optimistic, as anyone who is familiar with the coal industry knows. We now see enormous slippage and have from year to year in all of the projections that have been made. We are now looking at Coal Association projections currently of about 2 percent a year, Department of Energy projections of about 2 percent a year, and it is just a matter of simple arithmetic to take the 820,000 tons that we are looking at now and take the 2 percent a year on that, compound it, and see that the 250 million tons a year the pipeline industry is looking at simply couldn't be matched at all by the projected coal increases.

Let me make one further point. Even if they are right about that, the fact is that we are looking here, you are looking at a rail industry that has been hovering at around a 2-percent rate of return between 1980 and 1981. The Commission says that an adequate rate of return, a rate of return that will keep the enterprise in private hands and not result in nationalization and the infusion of public money, that kind of rate of return is 16½ percent.

Now the coal is our No. 1 commodity, and there simply isn't any way that we can get there from where we are without major increases in our coal transportation. Simply no one has been able to suggest to us any way. We can't think of any.

What is the consequence then? We would struggle to stay, of course, in private hands. The result would be that there would be major rate increases to the remaining shippers that are dependent upon the rail industry. We would have to price as much as we could to make up the lost revenue.

As I think Senator Danforth mentioned, the Administrator of FRA when put the question what would happen to grain rates in South Dakota said they would be higher than a cat's back, and with more specificity, he said they would have to go up 40 percent to maintain the same share of revenue that we had before. That would be true not only with respect to grain but with respect to the coal shippers that will would be dependent upon railroads, and no matter what kind of gathering facilities are available, and I might note that always in the past the pipeline witnesses have resisted any kind of branch lines out there, so we are talking about trucking to the gathering point, and that is an expensive operation, so there is obviously a radius limit, so all the rest of those shippers that would be dependent upon rail would be priced heavily.

Senator WARNER. At that point they are out of business, aren't they, at 40 percent?

Mr. DEMPSEY. The next point is we could price them only to a certain point. Once they go out of business, we are out of business, too, so the result is we couldn't possibly make up all of the revenue we would have to make up. There would be then a combination of high rates and deteriorating service, and as I think this Congress knows, that leads to a Penn Central type of catastrophe, and it would be ironic it seems to me if this Congress, having tried to revive the railroads in the Staggers Act of a couple of years ago, would pass a piece of legislation that would put us in worse shape than we were before Staggers, and that is what I think would almost certainly happen.

Jobs—Mr. Snyder and Mr. Mahoney will talk about that. I just want to note that this bill in some of the statements that I have read is being promoted now as a jobs creation bill. A couple of years ago when inflation was the problem and unemployment was not, it was promoted as an anti-inflation bill on the ground that pipelines were not labor intensive as opposed to railroads. Now it is said it will create 500,000 new jobs. We go into that in detail and what happens if you use the same methodology, Bureau of Labor Statistics' methodology and take into account what the slurry proponents do not, the other side of the equation, the loss of rail jobs, associated industry jobs. You come up with a net loss of 71,000 jobs. It is a job destruction bill, not a job creation bill.

Senator **Warner**. I am going to ask if you can stop. I will have to join my colleagues on the floor for this vote, and the hearing will resume as soon as one of the Senators returns. Thank you very much. Please forgive me.

[Recess.]

Senator **Warner**. The Chair has asked you to suspend for the purpose of the vote. Would you like to resume?

Mr. **Dempsey**. Thank you, Mr. Chairman. I have sort of talked about the bad news here, and I would like to turn to the arguments that have been advanced in favor of coal slurry pipeline.

We don't hear anything about lack of capacity of the rail industry. That used to be the principal argument 1 year ago, so I can pass that one by.

The principal argument that I guess I hear and that I have heard today is that there is a need for competition in coal. That is based I think in large measure on the notion that the railroads have a monopoly. Senator Johnston referred to captive shippers and a figure of about 85 percent of coal shippers being captive to rail. That figure is a National Coal Association figure. It is based as I recollect upon a questionnaire, and I am in no position to speak to it except in this sense. If one talks about captive shipper in terms of whether or not the shipper has only one rail line he can go to, then the figure is reasonably higher. I don't know if it is 85 percent, but it is substantial, but if one talks about it in the kind of economic terms that a court would agree is the issue in a monopolization case, then we have quite a different picture because then we are talking not simply about whether 20 or 40 railroads serve the coal mine, but upon whether there is, for example, competition from oil and gas and shale and what not, and whether there is geographical competition, and the Senator I expect probably knows about a recent very excellent example of geographic competition of the CSX system in competition with Massey Coal in West Virginia. It was threatened with the loss of a major contract to New England utilities because why? Because Conrail in combination with the Pennsylvania coal operation had promised a lower rate, so there were negotiations that went on.

Finally for CSX's benefit, successfully another contract was signed in Governor Rockefeller's office last week or the week before. It is that kind of competition that is pervasive, and I think the test of that is to look at what has happened to coal rates. If the rails indeed have a monopoly, you would expect to see some kind of exercise of that monopoly power in terms of coal rates, and indeed you see in some of the statements and in some of the references I expect today complaints about coal transportation rates. Well, I have got that in my report. They are readily available through the Bureau of Labor Statistics, and what that data shows is that if one takes a representative period of time, say 1970 to 1981, rail rates have gone up less than coal prices themselves, and here since Staggers I think these are interesting figures because we are now talking about what is asserted to be an essentially unregulated commodity.

The 15-percent figure that Senator Johnston referred to was an example of the idea that the Commission simply will not put any check upon coal rates. If that is the case, then listen to these figures.

For the 27 months since Staggers, coal transportation rail rates increased only one-half as much as they had in the preceding 27 months. Since Staggers, coal rates increased by only 1 percent, more than the average for all rail rates taken together.

Since Staggers, our costs according to the Interstate Commerce Commission have gone up about 19 percent, and coal rates have gone up only 22 percent, only marginally more than our cost increases. In 1982, our increases in coal rates were the lowest for the past 9 years, and during the last half of 1982, our coal transportation rates actually declined.

Now you might say well, there is a recession, but the recession is the test of monopoly. If the test of a recession is receding demand, a real monopoly's rates increase. You don't decrease them. When you have got a decrease of rates in the midst of a decrease in demand, it is the surest test of the fact that what you have got out there is competition and not monopoly.

It has been suggested well, in any case, it is a good idea to have competition, and I wouldn't deny that as a general proposition, but what we have in the first place, I would certainly make two observations. We have unfair competition because no matter what can be asserted about the character of these coal slurry pipelines as common carriers, they simply cannot be common carriers.

In response to Senator Johnston's question about whether the take-or-pay contracts would run into the coal companies or the pipeline companies, I think the initial answer was a little obscure. It was not obscure in the response to your question. It is perfectly clear that what we are talking here is filling the capacity of the pipeline or substantially filling the capacity with 25- or 30-year take-or-pay contracts. That is the only way that they can operate, and they have always acknowledged that, and that is not a criticism of them. That is just the economics of the business.

If that is the case, there is no way in creation they can be common carriers. The only way to put us on a level playing field with them would be to absolve us of our common carrier obligation which the Congress will not do, so we would be competing in effect with one hand behind our back with the common carrier obligation to serve everybody. They would be competing only for the cream of our business.

Second, because of the take-or-pay long-term contract, once that initial competition was gone, it would be gone for 25 or 35 years. If the Ohio pipeline which is sometimes referred to by proponents as showing the benefits of competition because the railroads came in with unit trains, if unit trains were built with take-or-pay contracts—the only reason it wasn't is because of the utilities lock, stock, and barrel—if that had been built with long-term contracts, take-or-pay contracts, nothing the railroads could have done could have taken that business back. It would have been frozen, and as you refer to the gas take-or-pay contracts that we have now, those customers of that unit would now be paying rates substantially above the market price because they would be locked in just as the gas customers have been with the Columbia Gas system take-or-pay contracts, for example.

It's the same as to the consumers. I think the only fair thing—I am trying to be fair about this every once in a while anyway. The only fair thing that I think can be said about this is that if you look at the OTA study, you simply can't tell—and Governor Peterson, the head of OTA, testified. He said look, the intangibles here are so many and so large that there is no way that anybody can tell with any precision at all whether indeed there would be any savings to indicate any lower rates in the case of pipelines than rail.

It is perhaps more instructive to look at the, and when you look at the escalation in costs of the ANESCO pipeline from $800 million at the start to $9 billion by the time they finished 9 years later or so, the ETSI figures that I have seen went up about 100 percent in about 2 or 3 years. Look at the coal stream study, and you will find their projected savings come to about 47 cents a month by 1990 as I recall, per consumer. That is a precious small savings I suggest in relation to the terrible costs in other respects of this kind of enterprise.

I did want to say in conclusion just one word about water. I am not a water expert, but this is obviously a critically important issue, and to me the most revealing thing about the testimony this morning was the answer that each of the witnesses gave to Senator Johnston's question about whether or not this law as presently written would preserve the validity of a law like Montana's that bars the exportation of water for coal slurry pipelines. Not a single one of them is willing to say it would—not a single one.

Indeed, their answers generally were well, likely not, on the face of the statute, although perhaps if the court would look at legislative history with written directions it might work.

To me there are only two conclusions, and they are all that can be drawn from that. One, the committee doesn't intend to go that far, and I don't know if it does or not, of course, but if it doesn't, then it is not really giving the States, it is not really giving the States what they thought they had before Sporhase, and indeed what it is doing is taking away from them the power of eminent domain by which they can in that perspective at least deny the use of water for the coal slurry pipelines.

On the other hand, if the committee indeed intends to go that far, it has tried now for a long time, and at least according to these experts it has not succeeded, and that gives testimony I suggest to the enormous difficulty if not the impossibility of drafting language that will be successful in circumstances where you have on the one hand a legislative declaration in favor of coal slurry pipelines and on the other a traditional unwillingness of the court to back off in the face of what appears to be a burden and a significant burden on interstate commerce.

Senator **WARNER**. Mr. Dempsey, I feel I will have to ask you to put your further observations in the record.

Mr. **DEMPSEY**. That's all I have.

[The prepared statement of Mr. Dempsey follows:]

PREPARED STATEMENT OF WILLIAM H. DEMPSEY, PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS, WASHINGTON, D.C.

My name is William H. Dempsey. I am President of the Association of American Railroads, a trade association representing the nation's freight railroads. Our members operate approximately 94 percent of the nation's railroad mileage, haul approximately 98 percent of the nation's railroad traffic and employ 92 percent of the nation's railroad workers.

I appreciate this opportunity to share with you the railroad industry's views on S. 267, the proposed Coal Distribution and Utilization Act of 1983.

The measure before this Committee does not deal with an issue new to Capitol Hill. This issue has been the subject of thousands of hours of hearings and debate, numerous government and private studies, countless speeches, and intensive lobbying.

The proposal itself has changed very little in the past eight years. It still has as its main goal the grant of federal eminent domain powers to the builders of coal slurry pipelines. And -- despite all the controversy that has surrounded this measure . . . despite years of failure to achieve passage -- proponents continue to describe it as "simple."

But, if the proposal itself has changed little over eight years, crucially important factors have changed greatly. Eight years ago, the nation was faced with oil shortages and rapidly rising oil prices -- both seeming to point to tremendous expansion in the use of domestic coal. Inflation was high and getting higher. And -- coming out of the recession of the mid-1970s -- unemployment was not seen as a major problem. Interest rates for long-term financing -- although they were not seen so at the time -- were comparatively low.

Pipeline promoters cited these conditions as justification for their claim on the federal power of eminent domain.

But none of these conditions exist today. Oil supplies are abundant and oil prices are continuing to drop. Coal forecasts are being revised downward. Though interest rates remain relatively high, inflation appears under control. Unemployment is now our most serious national concern.

Pipeline promoters know, as do all of us here, that the central issue in this controversy is the public interest. Will the public interest be served by government action to foster coal slurry pipelines?

Or will it be better served by leaving the power to grant eminent domain in the hands of the states . . . by leaving decisions to be made by those closest to each situation?

Pipeline promoters are attempting to show that their operations would so benefit the national public interest as to make it necessary to override the wishes of individual states.

One might expect that the dramatic changes I have described, taking place in such a short time -- a little more than one-fourth of the economic life of a coal slurry pipeline -- would have sobered slurry advocates and muted their claims. But that is not the case. They press their demands for special, virtually unique treatment by the Congress as vigorously as ever. They have developed new rationalizations to accommodate the new economic and energy situations -- and, when they couldn't do that, they have ignored the changes and invited us all to pretend we are still living in 1975.

Let us examine the pipeline advocates' claim on the public interest -- and try to see where the true public interest lies.

Labor

I would like to take up the matter of labor first because it is here that we have seen not only a turnabout in the unemployment situation but, in consequence, an almost Orwellian shift in the argument of slurry proponents.

Until unemployment became such an agonizing problem, pipeline proponents made much of the fact that it takes few employees -- compared to railroads -- to move coal by pipeline. Railroads, it was pointed out, were labor intensive, while pipelines were not. The point was that, with double-digit inflation, the railroads would be more affected by rising labor costs than slurry pipelines.

And with employment at reasonably high levels, slurry advocates set aside as inconsequential the findings by the Office of Technology Assessment (OTA) that coal pipelines would result in a sizeable net loss of permanent jobs. (OTA concluded that for every one permanent pipeline job created, six permanent railroad operating jobs would be lost.)

Today, however, unemployment is a serious national problem. A measure that would further reduce employment is not attractive. So, the pipeline promoters, finding themselves with a sow's ear, have attempted to fashion it into a truly remarkable silk purse.

Only a few months ago, pipeline advocates virtually papered Capitol Hill with this ludicrous claim. Curiously, when slurry advocates testified before the Interior and Insular Affairs Committee of the House of Representatives a few weeks ago, their claims were moderated.

I think this was wise, because the fact is that the very methodology cited by slurry advocates -- when applied properly -- demonstrates that the real effect of operating coal slurry pipelines would be a net loss of 71,000 jobs annually.

Obviously, I have no way of knowing whether proponents have truly seen the error of their ways. Perhaps they will resurrect their claim today or at some future time deemed propitious. Therefore, I propose to address it in some detail.

The Bureau of Labor Statistics (BLS) "methodology" which pipeline proponents use is simply a model designed to estimate the effects of revenue increases -- or decreases -- in various segments of the national economy. Sure enough, if you insert $12 billion -- the proponents' estimated construction costs for currently-planned pipelines -- into the heavy construction segment of the BLS model, you will find it producing 500,000 jobs in various lines of work.

Nevertheless, the result is invalid. First, according to the model, $12 billion would have to be spent in this one segment of the economy in a single year to produce a total of 500,000 jobs; and it is inconceivable that all the money needed to construct all the planned coal slurry pipelines would be spent in a single year. A far more likely scenario is that, even if this legislation passes today, relatively little would be spent for several years.

In other words, we are not in any way talking about a quick "shot in the arm" for 1983's unemployment problem -- nor for that of 1984, nor, in all likelihood, for that of 1985. Before construction could begin, contracts would have to be negotiated, routes surveyed, financing acquired, regulatory approvals obtained, environmental statements filed and land acquired. Even with eminent domain powers, this would be a protracted process.

Now, what would happen when construction finally began? Even on the altogether improbable assumption that every planned pipeline were to commence construction about the same time, it would take about five years to complete construction. Thus, we are talking about an average expenditure of $2.4 billion a year. This, according to the BLS model, would produce 100,000 jobs. But it would not produce 100,000 jobs the first year, added to 100,000 the second year and so on. The jobs disappear when the money does, meaning the fifth year total would not be 500,000 but 100,000 -- the same as the first year.

Even more importantly, the pipeline proponents fail to consider the effect on employment by virtue of a shift in coal transportation from rail to pipeline. We are talking here not only of a shift from railroads in the actual transportation of coal, but also a shift in construction from coal cars, locomotives and track improvements.

Currently proposed coal slurry pipelines, according to slurry advocates, will carry some 250 million tons of coal annually. Those 250 million tons represent virtually all of the growth in coal production over the next 10 years, according to recent projections such as those by the National Coal Association (NCA), Data Resources, Inc., and National Economic Research Associates (NERA) -- projections which reflect the realities of domestic and world economic conditions.

These recent projections are significantly lower than those thought likely during the height of petroleum shortages and OPEC solidarity. Since some increase in mine-mouth consumption of coal also can be expected, the movement of 250 million tons of coal by pipeline will almost certainly lead to contraction of rail coal traffic rather than the projected growth spoken of by slurry promoters.

What this means is that there will be no demand by the railroads for additional coal cars, locomotives and track improvements to handle this growth.

The value of this growth -- in terms of new coal hoppers, new locomotives and track improvements -- is $6.89 billion.[1]

According to the same BLS methodology, this investment would create 197,000 jobs. As with coal slurry pipelines, we can expect this investment to be spread over about five years, meaning more than 39,000 jobs annually as a result of railroad capacity expansion. Thus, it is incorrect to say that coal slurry pipeline construction will create 500,000 jobs -- or 100,000 jobs annually for five years. The loss of 197,000 jobs from lost railroad capacity investment -- 39,000 jobs annually -- must be subtracted out. And that is only the beginning.

Of far more lasting importance is the impact of the two coal transport alternatives on the permanent jobs needed to operate the systems.

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[1] Based upon the number of additional cars, locomotives and track improvements needed to handle 250 million additional tons of coal. Coal hopper cars cost $40,000 each; 3,500 horsepower locomotives cost $1 million each; and the track improvements associated with this increased tonnage are $1 billion.

Unit train transportation of the same amount of coal would produce rail revenues of \$3.5 billion annually.[2] The BLS methodology produces an annual estimate of 93,000 jobs associated with this railroad revenue figure -- reflecting the relative labor intensity of rail operations.

Assuming that the revenues generated by coal slurry transportation are equivalent to the revenues that would be generated by rail transportation, the BLS methodology produces an estimate of 22,000 jobs annually over the lives of the pipelines. If, indeed, coal slurry transportation could be performed less expensively -- and we seriously doubt it -- then the jobs created would be even fewer.

Correctly applied, the methodology seized by the coal slurry supporters indicates that the switch of 250 million tons of coal movements from railroads to pipelines might produce 61,000 more jobs annually over a five-year construction period but would then cause losses of 71,000 jobs each year for the next 30 years!

The railroad industry alone would lose about 41,000 jobs -- that's the equivalent of 11 percent of our total labor force. This threat comes at a time when rail employment has suffered its most precipitous decline in history -- from 510,000 to 388,000 in less than two years -- at a time when the U.S. Railroad Retirement Board says under existing conditions employment could fall to 300,000 by 1988 . . . at a time when the Railroad Retirement System with its one million beneficiaries is already confronting a 40 percent reduction in federal benefits because of the past drop in employment . . . at a time when railroad equipment manufacturers have had their worst economic year in modern history and now have four out of every five workers unemployed.

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[2] Based upon 10,000 tons of coal per unit train, a 700-mile average coal unit train haul and average coal unit train revenue of 2 cents per ton mile.

Moreover, it should not go unnoticed that many additional lost jobs will be associated with small coal mines. Giant coal pipelines can economically serve only the largest mines in a few areas. Smaller, more labor intensive mines would simply be less competitive at the mine mouth and would find their rail costs get even higher as the railroads have to recover costs that would have been absorbed by the coal now moving in pipelines. And these dislocations would be severe and painful in small mining communities.

Slurry pipelines never were and never will be labor intensive -- and slurry pipeline legislation never was and never will be job creation legislation. Quite the opposite. It would be job deprivation legislation.

Thus, if we are keeping a tote board on public interest issues with regard to slurry pipelines, we must -- in the column headed "jobs" -- write "No."

Coal Production

Of course, slurry proponents also allege that, because of anticipated increases in coal production, transportation of coal would not decline -- there will be "plenty to go around" -- and thus there won't be any reduction in rail employment -- or any real damage to existing modes of transportation.

Even if the slurry proponents' assumptions about coal production were reasonable, the figures cited above respecting rail unemployment and projected trends demonstrate that an increase in rail jobs associated with coal transportation is essential if the industry is merely to maintain stable employment.

But the slurry promoters' assumptions are not reasonable. They rely upon outdated projections of rapid coal growth -- projections such as one by the Department of Transportation's (DOT) Coal Transportation Task Force in 1978 predicting an almost doubling of coal production between 1975 and 1985; and one prepared by the Department of Energy (DOE) for Congress in 1979 which projected 1.13 billion tons of coal production by 1985, 1.35 billion tons by 1990 and 1.7 billion tons by 1995.

But these projections have given way to more sober assessments based upon the realities of the day. While there is a consensus that coal will continue to grow as a major source of energy, both domestically and world wide, the expectations of exceptional growth in coal that were held in the 1970s have largely faded. There are a number of reasons for this.

First, and most important, is the drop in per capita electric consumption in the U.S. The fact that people are using less energy has caused a chain of effects that have drastically altered expectations of coal use.

After four decades of 7 percent annual increases in electric power consumption, energy experts were thrust into unfamiliar territory by the oil embargo of 1973. The initial reactions were to assume that energy consumption patterns would continue virtually unchanged while the sources of energy would adjust to the change in the price of petroleum. In this light, forecasts made in the mid-70s tended to show very sizable increases in coal consumption.

However, altered circumstances have produced diminished expectations. The National Coal Association says there was a slight decline in 1981 production and another in 1982, with a forecast growth of only 2 percent for 1983. And in reporting that projection, NCA President Carl Bagge said, "The coal industry was slow feeling the effects of the recession and it will be slow coming out of it." This 2 percent growth rate is also projected by DOE. Based on production so far in 1983, both estimates for this year appear too high for total U.S. coal production.

And these more gloomy projections came before recent unraveling of the OPEC cartel -- an event which will not only lower oil prices for some time to come, but will greatly impede additional shifts by electric utilities from oil to coal.

National Economic Research Associates has projected an annual growth rate of less than 3 percent. If the annual growth rate continues in this range, it will take nearly 10 years before coal production increases by 250 million tons.

Some of this added production undoubtedly will be consumed via mine-mouth generation which currently handles 15 percent of coal production, up from 6 percent in 1970. Another portion of the 250 million tons, that which moves only short distances, will move by truck transportation. (Trucks now move something less than 10 percent of all coal production). Still other segments will be carried by barges -- the second largest mode of coal transportation -- since few of the pipeline routes parallel the waterways.

Thus, the planned pipelines' required diet clearly exceeds the total new coal traffic which will be available to the railroads in the next decade. If the railroads are faced with no growth, much less losses, in the product, which represents 40 percent of its tonnage, how can the industry ever hope to achieve an adequate financial status? With losses in its major commodity, significant elements of the rail industry will be facing the same shrinking traffic base that brought on the collapse of the Northeastern railroads.

Not all railroads will be affected. But those that find a pipeline built in their territory will be faced with huge adversities since the average pipeline proposed handles half as much total tonnage as all goods moving on a medium-sized railroad and more coal tonnage than moves on most large railroads.

There is clearly nothing in the coal outlook to justify the notion that a brand new mode of these dimensions can be superimposed on the coal-hauling business without serious harm to existing transporters which will lose most of their growth opportunities and some of their existing traffic also.

And, clearly, there is no justification for the notion that the addition of capacity and jobs in coal slurry will not inevitably bring a subtraction of employment in railroading.

Thus, the pipeline promoters are presented with a conundrum: If coal production does increase dramatically, the public interest is better served through the greater employment that would occur through rail carriage of additional coal. If, on the other hand, today's less optimistic projections prove true, the public interest would be greatly damaged by the skimming away of a vital industry's most important traffic.

Take-or-Pay Contracts

Next, let us turn to the question of take-or-pay contracts.

Slurry promoters concede that such contracts, under which utilities would be committed to pay for huge quantities of coal -- say 20 or 30 million tons a year -- over long periods -- say 25 or 30 years -- are essential to the financing of pipeline construction. The capacity of a pipeline would be committed under such contracts before a spade of dirt is turned.

But, say the promoters, such contracts would be beneficial to the utilities because, even if the pipeline rate starts out slightly higher than the rail rate, inflation will eventually push the rail rate higher due to the greater labor intensity of rail operations.

But the premise upon which this view was based -- persistent high inflation -- is now undermined. The double-digit rates of inflation so common in past years are now gone. Both the rates of increase in the consumer price index and in the producer price index have dropped significantly in just three years -- and Congress is pledged to keep those rates low to assure economic recovery.

But this is not all. The take-or-pay contract is equally unwise because there are numerous imponderables that could eventually cost the buyer of slurried coal -- the users of electricity and taxpayers as well -- far more than today's assumed market rates.

Slurry promoters are just unable to predict, with any degree of certainty, what the cost of building the pipeline will be -- including the cost of the money borrowed to do so.

For example, in January 1981, ETSI officials asserted that their pipeline could be constructed for a cost of $1.8 billion. In March

1982, an ETSI official told an international technical conference that the cost had escalated to $3 billion; and by January 1983, according to the Wall Street Journal, the cost was up to $3.8 billion. One can only wonder what the cost figures will be by the time construction begins.

And these wide margins of error are not restricted to ETSI. They plague pipeline promoters in general. The Alyeska oil pipeline was originally estimated to cost $800 million -- but the final cost was about $9 billion. The original estimated cost for the controversial Alaska-Canada natural gas pipeline was $10 billion. The most recent cost estimate for this pipeline is about $40 billion. Thus, any projection of pipeline costs must be considered suspect.

This is important to the public because, as Ronald Wasson, an official with Kansas City Power and Light Company, told the Senate Surface Transportation Subcommittee on September 13, 1982, if cost overruns occur, "The electric consumer would most likely end up paying [for them]."

Further, slurry promoters are just unable to predict the rate of inflation over the life of the 30-year contract; how long it will take -- if, indeed, the time ever comes -- before pipeline rates produce signficant savings over the potential rail rate; whether coal in a solid state will still be an economical way to produce energy 25 years from now; and what reason there is to believe that transportation technology will remain static -- as a pipeline in the ground must -- for the next 30 years.

A miscalculation with regard to any of these questions could easily produce a situation in which consumers of electric power will find themselves paying far more than "market" prices -- and the taxpayer might eventually be called upon to bail-out these failing pipelines.

Once a utility enters into such an agreement, it is tied up for the length of the contract. It cannot switch fuels or buy coal from a less expensive source. If it does, it must still pay for the pipeline-delivered coal. There is no opportunity for users to extricate themselves from these contracts because, unlike multiple-use facilities and rolling equipment that can be moved, pipelines are frozen in the ground and capable of moving only one product from one fixed point to another.

We have seen, right here in the Washington area, the incredible phenomenon of "deregulated" natural gas being bought at a price substantially higher than the "market" price. Why? Because the buyer, fearing natural gas shortages, entered into take-or-pay contracts with certain producers a few years ago. When these contracts were signed, the prices may have seemed attractive. But now the buyer is locked into the arrangement and cannot take advantage of the lower prices that currently exist. This would be the situation of any coal user who signed a take-or-pay contract with a coal slurry pipeline.

While the take-or-pay contract has often been presented as a way of guaranteeing deliveries at an agreed-upon price, its real function for coal slurry pipelines is to take all the risk out of the project.

With a take-or-pay contract in hand, pipeline promoters can raise the money needed to build the pipeline, for there is little risk to the financial institution. As for the construction contractors, they will earn big profits from a major construction project.

If something goes wrong, the utility receiving pipeline coal is not likely to lose either, because most utilities routinely pass along the cost of fuel to their customers.

Who, then, are the people who can lose in all of this? If the pipeline rate turns out to be higher than other available coal rates, the utility customers pay the price for the mistakes of others.

Pipeline promoters are fond of talking about the Cadiz, Ohio pipeline, built in the 1950s and closed in the early 1960s when railroads introduced unit-train rates for coal. They say the pipeline closed because it had "achieved its purpose" in lowering rail rates. However, if that pipeline had utilized a take-or-pay contract of the sort now planned as a pre-construction imperative for every coal slurry pipeline, the Cadiz pipeline would still be open and delivering coal at a rate above "market." It must be remembered that there was no take-or-pay contract at Cadiz because the pipeline was owned -- pipe, pump and centrifuge -- by the utility that used the coal.

If the take-or-pay contracts already in existence have worked to serve the public interest, that fact has not been discerned -- so another vote is entered in the "No" column.

No Competition

This point leads quite naturally to the pipeline promoters' claim that their mode will provide needed competition for railroads. Given the take-or-pay contract, this argument is absurd. Once a take-or-pay contract is signed, the coal buyer is locked into the use of one fuel -- coal -- delivered by one mode -- the pipeline -- from one source.

If, as I suggested before, improved transportation technology results in a cheaper way to move coal, the buyer must ignore it.

If cheaper kinds of fuel present themselves, the buyer must ignore them.

If deliveries are interrupted for any reason . . . pipeline malfunction . . . a labor stoppage at the mine . . . the buyer has lost his principal means of obtaining needed coal.

Twice in the past five years, the United Mine Workers Union has engaged in protracted strikes. Because most coal is rail-delivered, utilities had many options available.

They could -- and did -- stockpile extra-large amounts of coal in anticipation of the strike. Pipelines move full. There is little chance to stockpile extra slurry -- or to replace strike depleted stockpiles.

The utilities could -- and did, in some cases -- order coal from sources unaffected by the strike and have it delivered by rail. There is no way to change the route of a pipeline to obtain coal from a different source.

The utilities could -- and did -- order increased tonnages of coal after the strike to rebuild their stockpiles. Again, there is no way to do this with a pipeline.

Because a coal buyer, once signed to a take-or-pay contract, has no options, that buyer becomes far more of a "captive" than any railroad customer has ever been.

If Congress finally grants federal eminent domain and if coal slurry pipelines are built, what will result will be some initial competition for contracts -- a competition made unfair by the railroads' requirement to operate as common carriers and the pipelines' freedom to offer services as totally dedicated contract carriers.

Once that has been sorted out, competition will cease.

In recent days, however, pipeline advocates have fastened on the actions of the Interstate Commerce Commission (ICC) as a justification for their claim.

In one case, the Commission proposed to alter existing regulatory review of rail rates on coal for domestic markets.

In another, the Commission has exempted from regulation coal shipped by rail for export.

Slurry advocates say these actions prove the need for new competition in coal hauling. This is illogical. The mandate contained in the 1976 Railroad Revitalization and Regulatory Reform Act -- and broadened in the Staggers Rail Act of 1980 -- encourages the elimination of regulation whenever it is not needed to prevent abuses of market power.

Thus, these decisions represent a finding that sufficient competition already exists in coal transportation to prevent railroads from abusing their freedoms.

Indeed, we have seen such competition at work. Quite recently, an Eastern railroad renegotiated its contract to carry coal from a producer in West Virginia because it faced the certainty of losing that traffic to another railroad -- serving a different producer.

The new contract keeps the traffic for the railroad -- and the producer.

In addition to competition among railroads, the Commission recognized the existence of intermodal, product and geographic competition.

As you are aware, the U.S. Army Corps of Engineers is engaged in a $3 billion project to link the coal fields of Tennessee and Kentucky to the Port of Mobile via the Tennessee-Tombigbee Waterway. Additionally, hundreds of millions of dollars are being spent annually by the Corps to improve navigation facilities on the Ohio and Mississippi River systems for the benefit of inland commercial barges which carry coal to improved port facilities at New Orleans and near Baton Rouge. And the removal of the debt-payback requirement for the St. Lawrence Seaway will make ships engaged in both the domestic and export coal trades on the Great Lakes and the Seaway even more competitive.

The movement of coal by truck to barge facilities and even power plants accounts for the movement of some 10 percent of all U.S.-produced coal, according to the Department of Energy. Also, many utilities have been switching to mine-mouth generation of electricity -- which now accounts for some 15 percent of all U.S.-mined coal. Indeed, railroads are under constant competitive pressure from barges and trucks and mine-mouth generation alternatives.

Product competition refers to the ability of utilities -- and steel mills -- to use alternative forms of energy. Lower oil prices and market-based prices for natural gas are expected to make those alternative fuels very competitive with coal. Recent studies indicate that utilities have the option of making such changes -- and are doing so. Further, new electric furnace technology is allowing steel mills to foresake coking coal in the manufacture of steel. Surely the long-term vested interests of the railroads require that rail transportation remain competitive as to price and service. As the ICC remarked, "carriers must charge competitive rates in competitive markets or lose the traffic."

Geographic competition refers to the ability of utilities -- and foreign buyers -- to obtain their coal from alternative locations. One recent ICC study found that more and more, utilities which believe they are "captive" to a single railroad can purchase electricity from other utilities -- served by other railroads or other modes -- through power exchange agreements. Foreign buyers of U.S. coal have access to coal from other competing nations -- as do U.S. utilities. Again, the vested interests of the railroad industry require that rail transportation not price U.S. coal out of the market.

There is no more reason to believe that federal economic regulation of rail coal rates is needed to keep rail rates in check than there is in believing such regulation should replace market forces in the pricing of coal production.

As I have made clear on many occasions, rail coal rates over the past decade have increased far less than has the price of mine-mouth produced coal. Of course the price for rail coal transportation has increased. After our first oil crisis during the early 1970s, the public was skeptical -- dampening efforts at energy conservation and the switch to alternative fuels. Following the second oil crisis in the late 1970s, there was not only a dramatic shift to coal, but forecasters were unanimous in their expectations of even greater market demand in the future -- and the railroads met this new and expected demand by making unprecedented capital investments in plant and equipment. Virtually all main-line deferred maintenance was eliminated, state-of-the-art signalling and communication systems were installed to increase capacity, and rolling stock was replaced with larger-capacity equipment.

Coupled with strong demand for coal transportation and significant capital investment, rail coal rates naturally increased. After all, no prudent businessman will invest if the expected return on that investment is less than the cost of the capital needed for the investment. Once that investment was in place and was earning market rates, rail coal rates moderated considerably.

For the 27 months subsequent to the Oct. 1, 1980 passage of the Staggers Act, rail coal rates have increased only one-half as much as during the 27 months directly preceeding passage of Staggers. And, since Staggers, average rail coal rates increased by only one percentage point more than the average of all rail rates -- even though coal is alleged to be highly captive and even though the demand for rail coal transportation was much higher than for other commodities, most of which declined substantially due to recession.

Equally telling is the fact that coal rate increases during 1982 were the lowest for the past 9 years. And during the last six months of 1982, rail coal rates actually declined.

Furthermore, the effect of these rates has had a salutary effect upon electric utilities. For example, a principal proponent of coal slurry pipelines, Virginia Electric Power Company, announced last week that it is reducing electric utility rates because of significant savings it has achieved through negotiation of coal hauling contracts with the Chessie System Railroad. Such contracts, made possible by the Staggers Act, are now being filed in unprecedented numbers with the Interstate Commerce Commission. Recent productivity improvements accruing from plant and equipment investments, more favorable labor agreements -- coupled with the competitive market conditions I just focused on -- are serving -- and will continue to serve -- as strong moderating influences on rail coal rates.

Coal represents 40 percent of our traffic, but accounts for but 23 percent of our revenues. No other single commodity even approaches the volume of traffic represented by coal. If the railroads are to survive, we cannot afford to lose our coal traffic -- not to barges, not to trucks, not to mine-mouth generation, not to foreign producers, and not to coal slurry pipelines.

As the ICC's general counsel told attendees at a coal seminar in Houston recently, "The coal that doesn't move doesn't contribute to the railroad. To a fair degree, the railroad and mine operator are partners . . . It's in the interest of neither to deprive the other of an adequate profit (equal to at least the cost of capital)."

Damage to Railroads

Thus it is obvious that, rather than provide competition, coal slurry pipelines would simply seek to skim away the most profitable coal traffic, leaving railroads, as true common carriers, to serve those not considered desirable by pipelines.

I believe that it is safe to say that the spectre of deteriorating railroads is one that does not merely concern railroad stockholders. Throughout the 1970s, the Congress wrestled mightily with railroad problems -- seeking a way to make railroads financially viable through private enterprise. With the Staggers Rail Act of 1980, a giant step toward solution was taken.

Railroads responded well. Despite the severe downturn in traffic in 1981 and 1982, and its attendant losses in employment, railroads were able to survive through use of market freedoms made available by Staggers. No railroad went bankrupt in this recession.

But, take away a substantial share of the coal that is -- by far -- the largest single traffic and revenue source for our industry and all the effort put into Staggers will go for naught.

Since one must assume that the intent of Staggers was to serve the national interest in a healthy railroad system, it is difficult to see why the Congress would seek to undo its own work by fostering the development of a redundant transportation mode to siphon off the most profitable railroad coal traffic.

It is interesting to note in this connection that one difference between S. 267 and previous bills is that it contains no provision requiring a pre-certification determination as to the impact on existing carriers.

It is ironic in the extreme that this bill totally avoids any requirement to evaluate the consequences of proposed pipelines on railroads, their shippers and rail employees when these groups have been perceived by both opponents and supporters of this legislation to be among the interests most adversely affected.

The impact on railroads and on the shippers and communities dependent on them are predictable and quantifiable. Those coal customers left to the railroads will face higher rates because there will be fewer units of traffic over which rails may spread their fixed costs. Since there are practical limits on how much coal rates can be increased without putting producers out of business, rates on other rail-carried commodities will rise as well.

Even so, it will be impossible to recapture all of the lost revenues through rate increases. The Office of Technology Assessment in its 1978 report estimated that the superimposition of the coal slurry pipelines then planned upon the transportation system ultimately would result in lost net revenue to the railroads of about $700 million annually in 1971 dollars -- which, when restated in 1982 dollars, equals or exceeds total earnings in every year since 1971. Moreover, at the time of the OTA study, only 5 pipelines were planned; now 13 with a total capacity of 250 million tons are on the drawing boards -- meaning the losses could be more than double the original OTA estimate.

Since losses of this magnitude could not possibly be recouped through rail rate increases, the overall result would be a replay of the depressingly familiar picture from years recently past -- increasing rail rates coupled with deteriorating rail services.

There is also the matter of the Railroad Retirement System, a separate -- though similar to Social Security -- federally administered retirement program for rail workers. Declining employment in the rail industry has put a severe strain on the System.

As we speak, that System faces a crisis that has led the Railroad Retirement Board, in accordance with its responsibility under the law, to contemplate benefit cuts of up to 80 percent by 1984.

A recently negotiated agreement between rail management and rail labor -- involving, for example, increased payroll taxes and retardation of the growth of future benefits -- so as to prevent financial collapse of Railroad Retirement is being presented to Congress for consideration. However, according to the Railroad Retirement Board's calculations, the loss of 41,000 railroad jobs resulting from coal slurry pipeline construction would result in an 11 percent reduction in Railroad Retirement payroll taxes -- plus put greater strain on the Railroad Unemployment Insurance Fund -- which is already $400 million in debt. The railroads are already paying some 23 percent of annual payroll in retirement taxes, with employees paying nearly 9 percent. The new agreement contemplates an escalation of employee and employer taxes. By 1986, Railroad Retirement taxes will be about 36 percent of taxable payroll. A further increase of 10 percent would simply be beyond the capacity of the industry and its employees.

The activities of Congress over recent years to preserve rail service in the Northeast, to improve the financial health of the national rail system through reduced regulation indicate that the public has a vital interest in a viable railroad system.

So here, too, the "public interest" vote must go against the pipeline proposal.

Water Needs

Another major drawback to slurry pipelines is the immense amount of water they require. This has been much discussed in the past and has been a great source of concern for farmers, ranchers, environmentalists and officials of water-short states. Indeed these interests -- not often allied with railroads -- have constituted a solid base of opposition to slurry pipelines over the years.

They can -- and no doubt will -- discuss the water problem with more cogency than I, so I will leave it to them. I bring it up at this time only because this particular part of the controversy has brought forth a formulation by slurry interests even more bizarre than their assertions about all the jobs they would provide.

If the job argument was Orwellian, then I must observe that the latest set of arguments with regard to water must be described as suitable only for fans of Lewis Carroll.

The water needs of pipelines are undeniable. It takes a ton of water to move a ton of coal. A 55-million-ton-per-year pipeline, such as is planned in the East, would require 13 billion gallons of water per year -- enough to drain the Potomac River for a week.

Slurry backers have consistently tried to write language into an eminent domain bill which would satisfy state officials that they would retain control over water within their states. Nothing they could do -- or have done -- has had a chance of satisfying those in states which would share a water source with a pipeline-originating state.

Be that as it may, one would have thought pipeline promoters would have been devastated by two court rulings -- Sporhase vs.

Nebraska, U.S. ____, 102 S. Ct. 3456 (1982), and City of El Paso vs. Reynolds, Civ. No. 80-730 MB (D. N.M. January 17, 1983).

But no! They now say that state governments should welcome this legislation because it contains language affirming state control over water for pipelines.

The fallacy should be apparent to anyone who examines even in cursory fashion the court decisions and the proposed legislation. It would be one thing if the bill did indeed affirm state authority to control water for pipelines. But it does not. It only attempts to ensure that the grant of eminent domain will not derogate from whatever authority the states now have. If, as the recent court decisions indicate, that authority is extremely limited or even non-existent because of the pervasive import of the Constitution's Commerce Clause, then the bill's purported promise is wholly empty.

But that is not all. It is not simply a matter of the bill's guaranty being meaningless because there is -- contrary to long held views by the states -- nothing to guarantee. Much worse, the eminent domain provisions of the bill take away the states' only other power to protect themselves against unwelcome exportation by pipelines of vast quantities of water.

Right now, a state can control eminent domain rights for coal slurry pipelines. If a pipeline seeks eminent domain from a state, the state government can take its water needs into account when considering the matter and can no doubt prescribe appropriate conditions before granting the power to acquire land. This remedy is also open to a state "downstream" or one which shares an aquifer with a pipeline-originating state or one selling water to a pipeline.

It is incontestable that the proposed legislation would wipe out this line of defense for the states.

Ever so often, this slurry pipeline controversy should come to terms with reality. The reality is this: The slurry pipelines' threat to states' water resources is serious; recent court decisions have put in question -- to put it conservatively -- the states' power to deal with this threat directly through the regulation of exportation of water; this bill would eliminate the states' right to deal with the pipeline water problem through what may be their only remaining power -- eminent domain.

Eminent Domain

As noted in the beginning of this statement, S. 267 has often been described as a "simple" bill. Proponents point out that it asks for no federal funds. It asks simply that coal slurry pipeline builders be permitted to exercise the federal power of eminent domain in order to lay out the most efficient routes.

Such a desire is perfectly understandable. Certainly, there would be substantial costs involved in obtaining land for a route without such powers.

But that consideration is -- or should be -- irrelevant.

I have no doubt that there are many entrepreneurs who could benefit from government help of this sort. Perhaps there is a choice location for a factory in Ohio, but the owners are reluctant to sell their land for this purpose. Should the company seeking to build be given eminent domain powers?

Suppose a person in Arlington wants to open an Amoco station on a busy corner but the land is owned by the Shell dealer across the street? Should the Shell dealer be forced to sell?

Of course, these are extreme examples. But they point up an important fact about eminent domain.

Eminent domain -- state or federal -- is not the same as obtaining a building permit or even a zoning change. The right of private property in this country is held to be so important that it is not to be set aside except for compelling reasons affecting the broad public interest.

Railroads have exercised eminent domain powers granted by states. They have been granted because the state governments saw that their citizens would be benefitted by the presence of railroads.

In the last century, railroads building across the West exercised federally granted powers of eminent domain in some cases. These powers were federal in nature because no states existed in those areas. But there was a determination that the railroad construction would be in the broad interest of the whole American public. But where is the determination that coal slurry pipelines benefit the public interest? We have not found it yet.

Let's try, quickly, some other claims they have made over the years.

Once, pipeline promoters claimed that they were needed because the nation lacked sufficient coal transportation capacity. One study after another -- notably, studies by the Department of Transportation and the Office of Technology Assessment -- concluded that existing transportation modes can easily keep pace with all projected increases in coal production and use. And the railroads proved this by hauling record volumes of coal over the last few years while still showing a surplus of coal equipment. The railroads presently have the long-term ability to haul 30 percent more coal without buying more coal cars or more locomotives. We have $3 billion in coal-related equipment ready to roll and nearly 100,000 employees waiting to be called back to work.

Pipeline promoters have also attempted over the years to assert that they can provide great savings to the consumers of electric power by delivering coal at lower rates than railroads.

If this were valid, one would assume it could be demonstrated -- especially in studies commissioned by pipeline interests. Yet, in nearly 20 years of putting this argument forth, the best they have managed -- in a study directed by a company planning to build a pipeline -- is to claim that, 10 years after beginning, a pipeline to Georgia and Florida would save the residents of those states about 47 cents a month on their electric bills.

This was the finding of a study done by National Economic Research Associates for interests backing the planned Coalstream Pipeline in the East. To reach this conclusion, NERA had to assume that no coal would be transported to those two states by any other mode. Under that assumption, the projected savings to residential users, beginning in 1990, would be $31.3 million per year, according to NERA.

If that figure is divided among the current residents of Georgia and Florida, the result is 47 cents per month for each household.

Is this a definition of the public interest?

Does a saving of 47 cents a month warrant granting the right to cut a 1,500-mile-long, 100-foot-wide swath down the Eastern half of the nation against the wishes of property owners?

Does 47 cents a month justify the consumption and ultimate pollution of billions of gallons of water?

Does 47 cents a month justify crippling an industry that the Congress has -- only two years ago -- gone to great lengths to set on the path to financial health?

Does 47 cents a month justify the loss of 71,000 permanent jobs?

It is not enough for pipeline promoters to show that their mode is feasible.

It is not enough for them to claim that they need eminent domain to go into business. Every fledgling enterprise has needs which could be met by government.

It is not enough for them to show that other enterprises exercise powers similar to those they seek. Those enterprises have proven their relationship to the public interest. Slurry pipelines have not.

The builders of coal slurry pipelines must prove that they offer benefits to the broad general public of the United States that cannot be obtained in any other way and that the power of federal eminent domain is the only means by which they can provide those benefits.

I submit that they have failed to make such a showing. On the contrary, the more we learn about coal slurry pipelines, their water needs, their operating imperatives and their potential impacts, the more it is clear that they should not be the beneficiaries of federal government promotion in the form of eminent domain powers.

Technical Deficiencies

Finally, it must be recognized that there are serious technical deficiencies in S. 267, which is one of the shortest coal slurry bills ever introduced in Congress. Unfortunately, in this case, brevity deserves no applause. As written, S. 267 hardly protects the public.

This bill would permit the exercise of eminent domain power by a coal slurry pipeline if construction of the pipeline would be in the national interest. Most of the coal slurry bills introduced previously have used the phrase "public convenience and necessity" in place of "national interest." These bills set forth a number of criteria the federal government would be required to consider in determining whether a pipeline would be in the public's interest. Examples of criteria used in the past are: whether or not a pipeline would impair the financial integrity of another carrier or the existing level of transportation services provided by a carrier; the extent to which existing carriers have the ability to meet the transportation needs that a pipeline would serve; the extent to which a pipeline would disrupt coal producing regions other than the one it served; and the impact a pipeline would have on water supplies. All of these factors are vital public considerations.

By contrast, to "aid" in the determination of whether a pipeline would be in the national interest, this bill would use four general and vague criteria designed so that a negative decision would never be reached on the question of whether the power of eminent domain should be granted. The critical questions on the impact a pipeline would have on water supplies and railroads are omitted from the findings section of this bill.

This legislation addresses the transportation of coal. It is therefore inconprehensible that the Secretary of Energy would be given jurisdiction over coal slurry pipelines. The Interstate Commerce Commission is the one regulatory body with the most experience in coal transportation regulation. The absence from the eminent domain findings section of the impact on railroads criterion is no doubt tied to the use of the Energy Department rather than the ICC.

S. 267 would give pipelines a federal right of eminent domain, yet impose no obligations. No place in the bill is it ever hinted that coal slurry pipelines would be subject to any obligations to provide service. The Staggers Act, on the other hand, imposed obligations on top of already existing common carrier obligations for an industry with no federal right of eminent domain.

In addition, this bill does not require that the Department of Transportation promulgate pipeline safety regulations, as have most previous coal slurry bills. There are no common carrier obligations, no safety regulations. Congress would ask for nothing from pipelines in return for the granting of the power of eminent domain.

Finally, there is the water issue. Nowhere does this bill give a state the power to absolutely prohibit a pipeline from using its water. In fact, Section 7 of the bill states that nothing in the bill would preempt state law except insofar as the state law would have the effect of prohibiting operation of a coal slurry pipeline. Could not a prohibition on a slurry pipelines' use of water be construed as, in effect, a prohibition on the operation of a coal pipeline? In addition, does this bill address the problem of a shared aquifer being drawn down by one state for the purpose of selling water to a pipeline? No. Are the problems of states downstream from a state drawing water from a river for pipeline use addressed? No.

Conclusion

The railroad industry opposes this legislation for obvious reasons. We believe that government promotion of a redundant one-commodity contract carrier of coal, which will operate in a manner denied to the common carrier railroads, cannot help but damage our industry severely.

To the extent that a healthy railroad system is important to the national interest, our concerns should also be considered in the light of public policy.

However, railroads are not alone in opposing eminent domain powers for coal slurry pipelines. Attached to this statement is a list of some 57 organizations which have registered opposition to this legislation in the past -- 27 of whom signed an advertisement (also attached) last year in opposition to the legislation before the 97th Congress.

I do not speak for these groups. Among them, you will find interests not usually aligned with those of the railroads. I call them to your attention because I think it important to make clear that this is by no means just a railroad versus pipeline issue. There are important public policy issues to be decided.

Thus, while S. 267 may have a simple goal, it is most certainly not a simple bill.

It is a measure with profound implications and, in the opinion of the railroads and many others, disastrous consequences. I urge its defeat.

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JOB PRODUCTION PER $1 BILLION REVENUE

ACCORDING TO BUREAU OF LABOR STATISTICS METHODOLOGY

Industry Sector[1]	Rail Transportation	Rail Equipment Mfg.	Pipeline Transportation
Agriculture, forestry, and fisheries	86	147	30
Mining[2]	224	386	724
Maintenance and repair construction	2084	206	468
Manufacturing	2662	21821	737
Transportation	17482	1008	2788
Communications	150	144	45
Electric Gas and Sanitary Service	167	233	169
Trade	1265	2013	377
Finance, Insurance, and Real Estate	607	671	430
Other Services	1547	1769	600
Government Enterprises	210	238	59
Special Industries	0	0	0
TOTAL	26484	28636	6427

[1] These subheadings comprise 156 separate segments

[2] The additional mining jobs from pipeline transportation are in crude petroleum and natural gas. In terms of coal mining, the investment in rail transportation produces 34 jobs vs. 28 for the same investment in pipeline transportation.

ORGANIZATIONS OPPOSED TO

COAL SLURRY PIPELINE LEGISLATION

American Agricultural Movement
American Farm Bureau Federation
American National Cattlemen's Association
Association of American Railroads
Brotherhood of Railway and Airline Clerks - Freight
  Handlers, Express & Station Employees
Chambers of Commerce of:
  Missoula, Havre, Columbia Falls, Sidney, Forsyth
  and Wolf Point, Montana; Lovell, Powell and Grey-
  bull, Wyoming; Williston, North Dakota; Omaha
Colorado Grain and Feed Association
Economic Development Association of Eastern Montana
Environmental Policy Center
Friends of the Earth
General Assembly, Commonwealth of Virginia (Resolution)
Governors of the Old West Regional Commission
International Association of Machinists and
  Aerospace Workers
Isaac Walton League
Kansas Grain and Feed Association
Kansas Wheat Growers
Laurel (Mont.) City Council
Midwestern Conference of the Council of State Governments
Montana Association of Conservation Districts
Montana Cattlemens Association
Montana Chamber of Commerce
Montana Democrat Party
Montana Farmers Union
Montana Stockgrowers Association
Montana Woolgrowers Association
National Farmers Organization
National Farmers Union
National Grange
National Wheat Growers Association
Nebraska AFL-CIO
Nebraska Association of Resource Districts
Nebraska Chapter Sierra Club
Nebraska Farm Bureau
Nebraska Farmers Union
Nebraska Grain and Feed Association
Nebraska Stockgrowers Association
North Dakota Water Management Districts Association
North Dakota Water Users Association
Northern Plains Region of Conservation Districts
Northern Plains Resource Council
Northwestern Shippers Advisory Board

Railway Labor Executives Association (includes 20 unions representing ALL railroad employees)
Railway Progress Institute
Sierra Club
United Mine Workers
Western Governors Regional Energy Policy Office, Inc. (includes Arizona, Colorado, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, Utah, Wyoming)
Western Nebraska United Chamber of Commerce

(As of July 14, 1982)

Advertisement

Advertisement

SOME PEOPLE WOULD BENEFIT FROM COAL SLURRY PIPELINES.

"If pipeline economics do result in savings, the benefit will accrue to the coal mining, electric utility and pipeline industries."
"A Technology Assessment of Coal Slurry Pipelines," 1978, Office of Technology Assessment, U.S. Congress

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MOST WOULD NOT.

"... the costs of errors in judgment will probably be borne largely by the public and not necessarily the utility investors..."
"A Technology Assessment of Coal Slurry Pipelines," 1978, Office of Technology Assessment, U.S. Congress

We did the underlining so the point would be clear: If legislation granting special favors for coal slurry pipelines is passed, a few—those named above—can win, but they can't lose. The public? Well, they can lose—but they don't have much chance of winning.

It is said that you can learn a lot about a person by knowing who his friends and enemies are. Perhaps the same can be said for legislation.

Two pieces of legislation now under consideration, House Bill 4230 and Senate Bill 1844, would grant federal eminent domain powers to builders of coal slurry pipelines. This would give slurry pipelines a very special status and competitive edge.

Who are the "friends" of this legislation? Big coal mining and electric utility interests, along with the multinational construction companies who want to build the pipelines—the very ones the Office of Technology Assessment (in a study for Congress) said would get all the benefits.

Who is against the legislation? The railroads and rail-related industries and unions are against it, of course. But the record also shows that mine workers, farmers, ranchers, environmentalists and many others have stood up against special favors for coal pipeline builders.

And the biggest opponent of all should be consumers—they are the ones the OTA said would bear all of the risks and get none of the benefits.

And—except for those few named by the OTA—what benefits are there?

Is it a benefit to move a ton of water with every ton of coal (13 billion gallons a year in just one of the planned pipelines) from regions where water is dear to regions in delicate ecological balance that must then dispose of all that tainted slurry water every year?

Is it a benefit to take away the powers of the states to control water and land use by usurping their traditional ability to grant or withhold eminent domain rights?

Is it a benefit to build pipelines across farmland and ranchland regardless of the wishes of farmers and ranchers, across rivers and mountains with always the danger of a spill and environmental catastrophe?

Is it a benefit to take away more than 41,000 permanent jobs from railroad people, and still more jobs in related industries, to create fewer than 7000 permanent pipeline jobs?

Is it a benefit to tie up $30 billion dollars of capital to build unneeded pipelines when the country is already short of capital for economic growth?

Is it a benefit to favor a few big coal producers and a few big utility companies at the expense of other large producers and nearly all of the small companies and their employees—who don't have the volume to attract a pipeline and will face rail rates driven higher by the loss of volume traffic?

Is it a benefit to cripple a vital industry—the railroads—by skimming away important traffic, thus hurting consumers who will pay higher prices for a wide range of rail-delivered goods?

Is it a benefit to do all this and more when there is no need? When American railroads moved more coal in a single week of 1981 than in any week since the heyday of 1926... and have the capacity on wheels right now to move 25 percent more without building a single new car?

If coal slurry pipelines are a good idea, they should be able to compete without special government favors and privileges—under the same rules as everyone else.

Who's against eminent domain for coal slurry pipelines? You should be. And if you are, you should write your senators and representatives and tell them so. If you'd like more information on the subject, write "Oppose Slurry," Dept. 80, Association of American Railroads, 1920 L Street, N.W., Washington, DC 20036.

Association of American Railroads
Railway Progress Institute
Brotherhood of Locomotive Engineers
United Transportation Union
Environmental Policy Center

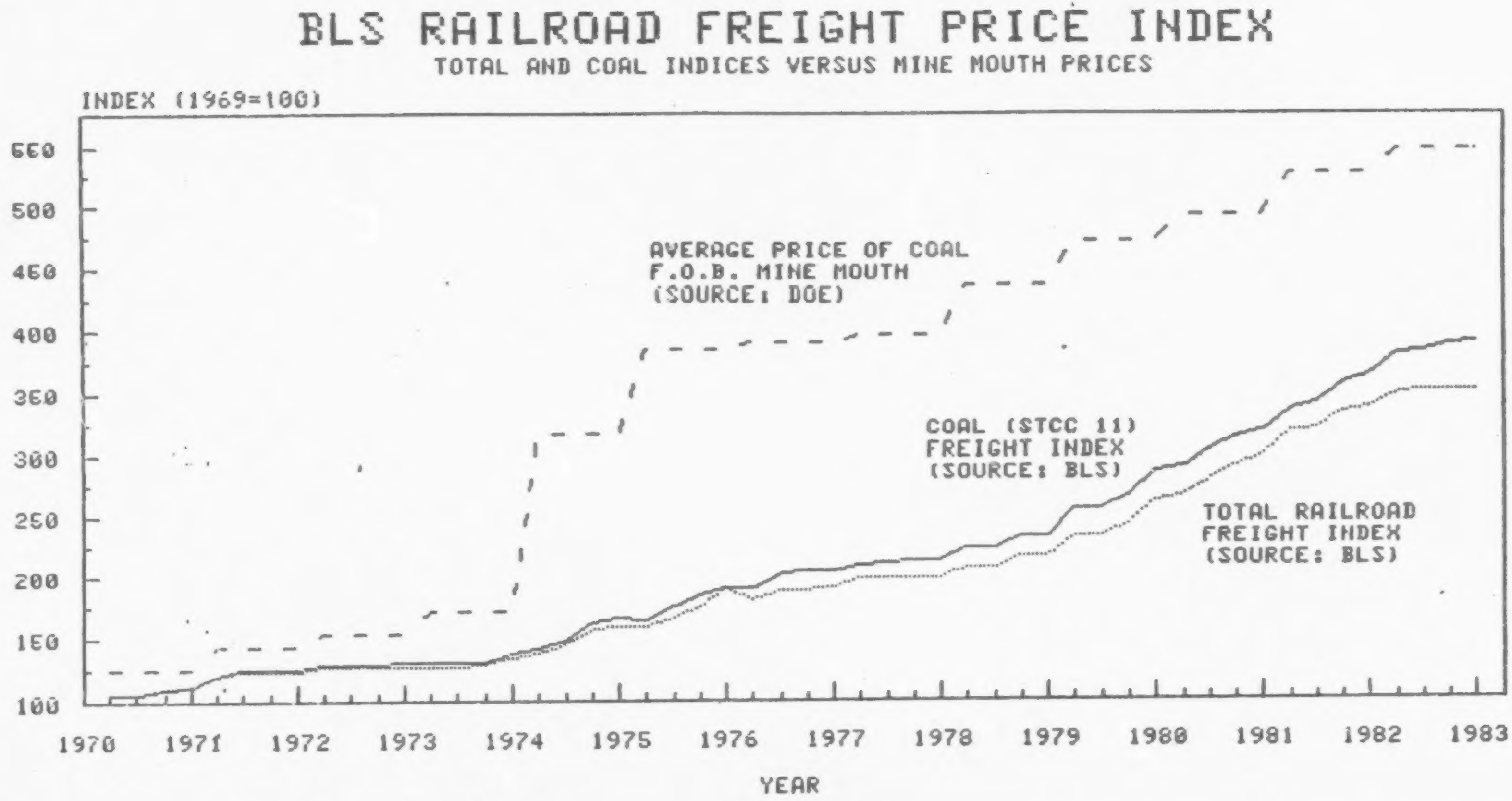
Brotherhood of Railway, Airline & Steamship Clerks
American Train Dispatchers Association
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen

Brotherhood Railway Carmen of the U.S. and Canada
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths

Railway Labor Executives' Association
Transport Workers of America
United Mine Workers
Midland Ross Corporation
International Brotherhood of Electrical Workers (10th District)

Griffin Wheel Company
Abex Corporation
Pullman Standard Inc.
Safetran Systems Corporation
American Steel Foundries
General Signal Corporation

National Farmer's Organization
National Farmer's Union
National Cattlemen's Association
National Wheat Growers Association


BLS RAILROAD FREIGHT PRICE INDEX
TOTAL AND COAL INDICES VERSUS MINE MOUTH PRICES
INDEX (1969=100)
550
500
450
400
350
300
250
200
150
100
AVERAGE PRICE OF COAL
F.O.B. MINE MOUTH
(SOURCE: DOE)
COAL (STCC 11)
FREIGHT INDEX
(SOURCE: BLS)
TOTAL RAILROAD
FREIGHT INDEX
(SOURCE: BLS)
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
YEAR

Senator **Warner**. Thank you. You mentioned a contract with Massey. Was that connected with CSX?

Mr. **Dempsey**. That's right, Mr. Chairman. It is the Norfolk.

Senator **Warner**. Thank you. We will have Mr. Denis Dwyer, government affairs representative, Railway Progress Institute.

Mr. **Dwyer**. Good afternoon, Mr. Chairman. Thank you. My name is Denis Dwyer, and I appear before you today to express the firm opposition of the Railway Progress Institute to the granting of Federal eminent domain for the coal slurry pipeline.

Mr. Chairman, I would ask that our full statement be placed in the record.

Senator **Warner**. It will be. You touch on the highlights which you feel haven't been fully explained.

STATEMENT OF DENIS J. DWYER, GOVERNMENT AFFAIRS REPRESENTATIVE, RAILWAY PROGRESS INSTITUTE, WASHINGTON, D.C.

Mr. **Dwyer**. The Railway Progress Institute, or RPI, is the trade association of suppliers to our railroads and rail rapid transit system.

Our association is sponsored by some 140 companies ranging from Fortune 500 corporations to smaller organizations whose sales amount to less than $1 million per year. We make and supply most everything that is required to create and run a railroad.

The railroads, simply stated, are the lifeblood of our industry. Coal slurry pipelines are a direct threat to the health of railroads since coal is their primary cargo. That is certainly obvious. Coal slurry pipelines are, therefore, a direct threat to the existence of our member companies. Of the 16 freight car builders within our membership, the situation for over half of them is somewhat repetitious—Berwick Forge and Fabricating Co., closed; Bethlehem Steel Corp., closed; Emons Industries, closed; General American Transportation Corp., closed; Greenville Steel Car Co., closed; the Maxson Corp., closed; North American Car Corp., closed; Pullman Standard has two plants closed; and Richmond Tank Car Co., closed.

Senator, six of these companies are located in the economically devastated State of Pennsylvania. The other companies are scattered throughout the Midwest and the South.

The other half of our car builders are operating on a total car order backlog of 4,155 cars, the average backlog for a single company in a good year. Compare that with the backlog of 119,201 on January 1, 1980. I think you can understand the depth of our distress.

You should also understand, Mr. Chairman, that freight car production is a barometer of our industry, and the situation is equally as dismal with companies that supply other rail componentry, including wheels, trucks, and brakes. Three companies have brand-new plants that have not opened because there is no work. Other companies have closed plants permanently to consolidate costs and to recognize a permanent decrease in demand as a result of the change in current economic situations.

While much of the economy has been in the recession, our industry has been and remains in an acute depression. We had a 61.8-unemployment rate last November. That is November 1982. This represents as many as 310,000 people unemployed, and it is even worse today. This statistic has earned us the terrible distinction of being first on the Mellon Bank's list of industries most devastated by economic conditions, a list of which is appended to our testimony.

The bank found that the output of railway equipment manufacturers dropped a staggering 87.8 percent between October 1979 and last November. Our output is lower than construction equipment, automobiles, and even basic steel.

The one bright hope we have is a new demand for coal freight cars. Then we can bring back our workers. Our plants will be alive once more, and our people will be busy on assembly lines rather than idle in unemployment lines.

I am certain that is what this committee and the full Congress wants, Mr. Chairman, and as you know, this will have the exact opposite effect for us. By giving the right of eminent domain to gain some new and temporary construction jobs, you are going to obliterate other sustained jobs over the years to come by the hundreds and thousands. Slurry pipelines would eliminate for years any significant demand for coal cars.

Now let me touch briefly on the issue of national defense. If we find ourselves in another conventional war, our technologically advanced heavy industrial plants that are members can be immediately put to work in building machines and supplies that our Armed Forces might need. During World War II we were needed and we were there. For example, the car plants manufactured tanks and munitions for the duration of the war.

The very best that can be said for this legislation is that the temporary pipeline construction would be transferred from existing ongoing basic American industry to other industries. In other words, far from adding 500,000 new jobs to the total of available jobs in the Nation as the coal slurry pipeline proponents claim, the legislation you are considering in light of the statistics I have already cited would result in at best a net loss of jobs available in the manufacturing sector of our economy. It would certainly decimate at least our industry.

In making one final point, Mr. Chairman, I imagine that the panel following us will introduce a letter from Martin Van Buren to then President Andrew Jackson pretty much outlining some of the issues I have raised here and in fact stating the situation as such that the railroads as the coming force in transportation would endanger the canal system and certainly endanger national defense and the like, and while not having the text of that letter before me, it certainly seems like an apt analogy but certainly does not fit into today's economy and today's situations, and I think you will agree with me on that.

Mr. Chairman, in closing, we urge as vigorously as we can that you not report this act. Senator Johnston, I realize that you are the sponsor of the bill. Nonetheless, we do hope that you will give us some consideration in dealing with these issues.

Thank you.

[The prepared statement of Mr. Dwyer follows:]

PREPARED STATEMENT OF DENIS J. DWYER GOVERNMENT AFFAIRS REPRESENTATIVE, RAILWAY PROGRESS INSTITUTE, WASHINGTON, D.C.

Good morning, Mr. Chairman and members of the Committee. My name is Denis J. Dwyer. I am Government Affairs Representative for the Railway Progress Institute. I thank you for this opportunity to appear here and present our case.

The Railway Progress Institute, or RPI, is the trade association of suppliers to our railroads and rail rapid transit systems. Our association is supported by some 140 companies ranging in size from FORTUNE 500 corporations to smaller organizations whose sales amount to less than $1-million per year. When our plants are working, our members supply freight cars, locomotives, rails, ties, signaling equipment, and maintenance-of-way equipment. Almost everything that is required to create and run a railroad is manufactured or supplied by our members.

Clearly, Mr. Chairman, the railroads are the life's blood of our industry. Coal slurry pipelines are a direct threat to the health of the railroads, since coal is their primary cargo. Coal slurry pipelines are, therefore, a direct threat to the existence of our member companies and, consequently, a threat as well to the readiness of our national defenses -- as I will explain in a few minutes.

Let me at this time spell out in some detail the economic situation within our industry.

In peak times, we in the railway supply industry have employed as many as 500,000 persons.

Here is the present situation of half of the freight carbuilders within our membership:

Berwick Forge & Fabricating, Berwick, Pa. -- Closed

Bethlehem Steel Corporation, Johnstown, Pa. -- Closed

Emons Industries, Inc., York, Pennsylvania -- Closed

General American Transportation Corporation,
Chicago, Ill. -- Closed

Greenville Steel Car Company, Greenville, Pa. -- Closed

The Maxson Corporation, St. Paul, Minnesota -- Closed

North American Car Corporation, Chicago, Ill. -- Closed

Pullman Standard carbuilding plants in
Butler, Pa., and Bessemer, Alabama,
formerly the largest in the nation -- Closed since 1981

Richmond Tank Car Company, Houston, Texas -- Closed

Seven other carbuilders are barely operating on a backlog of car orders totaling a miserable 4,155. Compare that with a backlog on January 1, 1980, of 119,201 or with 83,805 at the beginning of 1981 and 16,485 on January 1, 1982. As you see, while much of the economy has been in a recession, we have been and still are in an acute depression, Mr. Chairman.

The situation is equally as dismal with companies that supply components for railroad freight cars. Let me cite a few examples:

Griffin Wheel Company has a brand new wheel plant in Columbus, Ohio. The plant has not yet been opened. It sits there ready and vacant.

Youngstown Steel Door Company of Youngstown, Ohio, has a brand new plant. It is closed totally.

Abex Corporation's brand new plant in Johnstonw, Pennsylvania -- not opened yet.

Dresser Industries' foundry near Buffalo, New York -- closed for six months.

You can see, Mr. Chairman, that there are millions upon millions of dollars invested in plants, both new and old, that are idle. Our industry had a 61.8 percent unemployment rate last November. The situation is even worse today.

I trust you can see that it is no exaggeration to say that our economic lives are at stake right now, and some of our member companies may not survive.

You must hark back to the Great Depression of the 1930's, to 1938 in particular, to find as dismal a year as 1982 was for the delivery of new and rebuilt freight cars.

All of the facts I have just recited have earned for us the terrible distinction of being Number One on the Mellon Bank's list of industries most devastated by economic conditions. The bank has found that the output of railway equipment manufacturers dropped by a staggering 87.8 percent between October, 1979, and last November! This compares with a drop of 63.8 percent for basic steel. (A table showing the industries with the most severe dropoffs is attached.)

The one bright hope we have, in this depressed basic industry of the United States, is a fresh demand for freight cars. We are all awaiting the upturn in the economy and the railroads' full utilization of their existing fleet of cars. Then we can bring back our workers. Our factories will be alive once more. Our people will be busy on assembly lines rather than idle in unemployment lines.

I am certain that is what this Committee wants, Mr. Chairman; and I am certain that other members of the Congress of the United States want the same. This measure now before you will have the opposite effect for us. By giving the right of federal eminent domain to gain some new and temporary construction jobs, you are going to obliterate other sustained jobs over years to come by the hundreds of thousands. Slurry pipelines would eliminate for years any significant demand for coal cars.

Now, let me elaborate briefly upon my allusion to the matter of national defense.

Obviously, no great new fleets of trucks and barges are going to spring into existence to carry the materials of war if we find ourselves in another conventional war. Only the nation's freight railroads, acknowledged to be the most modern and efficient in the world, can handle that task. They have to be in place and economically healthy when they are needed.

Just as obviously, we are not going to create immediately or even in a short time the technologically advanced heavy industrial plants that our members own -- plants that can be put to work almost immediately on building the machines and supplies that our armed forces require at a time of national emergency. Our member companies must also be in place and healthy when we are needed as were, for example, the Pullman plant and the Thrall Car plant which manufactured tanks and munitions during World War II.

If the current economic indicators prove out and our economy does return soon to normal, then I believe our member companies will be able to survive and return to normal employment levels -- provided the Congress does not remove the brightest spot in our industry's outlook.

The very best that can be said for this legislation is that the temporary pipeline construction jobs would be transferred from existing, ongoing basic American industry. In other words, far from adding 500,000 new jobs to the total of available jobs in the nation, the legislation you are considering would most certainly result in a tremendous loss of jobs in manufacturing.

We have come here, Mr. Chairman, in confidence that you and your Committee will consider our facts and our point of view. We have come in full confidence that, once aware of the stake that our industry has in this issue, you will see that you really are helping to decide whether our jobs are going to be eliminated and our factories closed permanently, at a very significant cost to our nation and its defense readiness.

The Railway Progress Institute urges as vigorously as we can that you NOT report the Coal Distribution and Utilization Act of 1983.

I thank you for your concern and attention, and I will be pleased to respond to any questions you may wish to ask.

# # #

March 10, 1983

INDUSTRIES RANKED BY OUTPUT CHANGE
(TROUGH* OVER INDIVIDUAL INDUSTRY PEAK (1978-1982))
(Source: Mellon Bank, N.A.)

				Percent Change	
	Month of Latest Data	Date of Peak	Date of Trough	Trough* over Peak	Latest Month over Peak
Railroad Equipment	DEC	OCT 79	NOV 82	-87.86	-82.87
Basic Steel & Mill Products	DEC	DEC 78	NOV 82	-63.86	-62.73
Trucks & Buses	DEC	DEC 78	AUG 81	-63.80	-54.44
Total Autos	JAN	NOV 78	JAN 82	-61.62	-39.20
Oil & Gas Drilling	DEC	DEC 81	OCT 82	-46.92	-40.79
Tires	DEC	JUL 78	DEC 81	-46.40	-39.76
Household Appliances	DEC	DEC 79	DEC 81	-45.12	-30.96
Construction & Allied Equipment	DEC	AUG 81	NOV 82	-43.07	-42.52
Television & Radio Sets	DEC	JUL 78	NOV 82	-42.60	-41.87
Paints	DEC	DEC 78	xxx	-33.38	-33.38
Shoes	DEC	JAN 79	xxx	-31.44	-31.44
Structural Metal Products	DEC	JUL 79	xxx	-30.56	-30.56
Metalworking Machinery	DEC	FEB 80	xxx	-27.88	-27.88
Agricultural Chemicals	DEC	SEP 81	xxx	-27.27	-27.27
Basic Chemicals	DEC	JAN 80	SEP 82	-26.55	-21.31
Clay, Glass & Stone Products	DEC	JAN 79	MAY 82	-25.68	-24.02

Industry Peak: The highest value from January 1978 to the latest month.
Industry Trough: The lowest value since June 1981.
xxx Indicates production still declining as of latest month.
* Uses latest month if trough not yet established.

February 16, 1983

Senator JOHNSTON [presiding]. Next, Mr. J. R. (Jim) Snyder, chairman of the Legislative Committee, accompanied by William C. Mahoney, counsel, Railway Labor Executives' Association.

STATEMENT OF JAMES R. SNYDER, CHAIRMAN, LEGISLATIVE COMMITTEE, RAILWAY LABOR EXECUTIVES' ASSOCIATION, WASHINGTON, D.C., ACCOMPANIED BY CLINTON J. MILLER III, ATTORNEY-AT-LAW, HIGHSAW & MAHONEY

Mr. SNYDER. Thank you, Senator and members of the committee. I thank you for inviting me to appear here today, and for the record, Mr. Mahoney was unable to be here to represent us today. I have Mr. Clint Miller who is replacing Mr. Mahoney.

Mr. Chairman, in compliance with the committee's request here, I have a full statement and would like it to be inserted into the record, and I have a summarized statement here. With your permission, I will proceed with that.

Mr. Chairman, as you know, the RLEA has testified many times over the years before many committees of both Houses of Congress on legislation very similar to S. 267.

Now for the first time the construction and operation of coal slurry pipelines is claimed to be a jobs bill. The passage of this legislation would in fact result in a net loss of jobs to the citizens of the United States. That loss of jobs would be concentrated in the railroad industry, including its suppliers. Due to the limited time, I will direct my remarks primarily to the "jobs" aspect of the legislation.

In 1978 OTA report which has been quoted and relied upon a great deal during the course of the many hearings on this subject before the Congress projected that by the year 2000 there would be 365,000 direct railroad jobs in the United States. It also projected that the construction of only five pipelines—that was the only number being considered—would result in the loss of some 16,000 railroad jobs by the year 2000. The now proposed 13 pipelines would cause the loss of some 41,000 rail jobs. Employment in the railroad industry today is almost as low as OTA predicted for the year 2000. It has plunged from 514,000 in July 1981, to 388,000 in January 1983, a drop of 25 percent in 18 months, and 70,000 railroad employees are now on furlough. The railroad retirement system is facing disaster.

Those who support this bill claim that the construction of the planned 13 slurry pipelines will produce some 500,000 new jobs which would include 50,000 direct construction jobs and 100,000 manufacturing. I don't know where the 50,000 and hundred thousand figures were obtained, but I am pretty certain that the 100,000 jobs assigned to manufacturing would probably be jobs in other countries unless there was a, quote, "buy America provision," unquote in S. 267 as enacted.

It appears that this figure of 500,000 was arrived at simply by using Bureau of Labor Statistics' methods. It would seem that proponents of this legislation estimated that $12 billion would be spent on pipeline construction, and determined from Department of Commerce statistics what portion of that amount would be considered labor costs, and then divided that figure by the BLS average wage data in the heavy construction industry. The end result of this arithmetic was 500,000, but that is not 500,000 jobs. It is only 100,000 jobs a year for 5 years, assuming construction takes 5 years.

If the pipeline movement will be 250 million tons of coal a year, the loss of that coal movement by rail and the loss of rail jobs must be measured against the jobs created by pipeline construction. The rail industry contends that the diversion of this coal from transportation by rail to pipeline will mean that 39,000 rail equipment manufacturing jobs per year for 5 years will not be created. Absent pipeline construction, the railroads would invest some $6.895 billion in hopper cars and locomotive construction and track improvements. This investment would yield 197,000 jobs over 5 years, using BLS methods, or 39,000 jobs a year for 5 years.

In addition, the rail industry study shows that only 22,000 jobs will exist related to pipeline operations over a 30-year period, while 93,000 rail jobs would exist over the same period but for the pipelines. These figures are reached by applying the BLS method to projected revenues for the movement of 250 million tons of coal annually.

The revenue produced by pipelines and railroads for the movement of 250 million tons of coal would be about the same. When BLS methods are applied to these revenue figures, the result is that 22,000 permanent jobs would exist if the pipelines moved the coal, while 93,000 permanent jobs would exist if the movement was by unit coal train.

Even if we assume immediate construction of all slurry pipelines, the net effect of job creation by pipelines as opposed to railroads is definitely a minus figure.

The effect of individual coal slurry pipelines on employment on individual railroads would be much worse if such railroads are driven into reorganization and bankruptcy by competition from parallel pipelines. In such cases, the employees and this Congress would be faced with future Rock Island, Milwaukee, and Conrail situations.

The railroad retirement trust fund is in peril at this time and the Congress is currently considering ways to repair the damage done by the rapid and steep fall in railroad employment due to the current prolonged recession which to a railroad employee with 25-percent unemployment in his industry is a full-blown depression, and Mr. Chairman, I would like to point out here for the railroad retirement system we are talking about 1 million retired widows, survivors and all on the rolls today, and with over 100,000 people less paying into it in the last 18 months with the 25-percent unemployment in the rail industry, it has created many problems. On instructions from the committee that handles the legislation on Capitol Hill, both the House and the Senate, the parties are to get together and negotiate an agreement, and this has been done and now it is moving on the House side. It moved through the Commerce Committee. It will affect 1 million retired employees, with drastic effect on a work force of almost 400,000 that is paying into the fund, and if we are successful and the Congress sees fit to adopt the package pretty well as the parties had worked it out, and then Congress turns around and accepts legislation like this for the pipelines which we have pointed out in the next 5 years that you could completely dismantle and disrupt the entire railroad retirement system which you already have repaired, it doesn't make a lot of sense.

In closing, we have appended to our statement here an amendment that provides employee protection in case the coal slurry pipeline legislation should become law. We are not saying as rail employees of this country, are not saying that we would support coal slurry pipeline in any fashion, form, or way, if the amendment is adopted.

All we are saying is that it is a protective clause here. The pipeline people consistently say they won't affect the railroad. If it is not going to affect the railroad and its employees, the amendment won't mean anything, but if it does and they pass the legislation, then it does protect the employee, and I want to make that very clear.

We are open to any questions. Thank you very much.

[The prepared statement of Mr. Snyder follows:]

PREPARED STATEMENT OF JAMES R. SNYDER, CHAIRMAN, LEGISLATIVE COMMITTEE, RAILWAY LABOR EXECUTIVES' ASSOCIATION, WASHINGTON, D.C.

My name is James R. Snyder. I am Chairman of the Legislative Committee of the Railway Labor Executives' Association and the National Legislative Director of the United Transportation Union. I am accompanied by William G. Mahoney, counsel to the Railway Labor Executives' Association. I present this statement on behalf of the Railway Labor Executives' Association in opposition to the enactment of S. 267.

The membership of the Railway Labor Executives' Association consists of the chief executive officers of twenty standard national and international railway labor organizations. They are:

American Railway & Airway Supervisors Association,
  Division of BRAC
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of the United States
  and Canada
Brotherhood of Railway, Airline and Steamship Clerks,
  Freight Handlers, Express and Station Employes
Hotel & Restaurant Employees & Bartenders'
  International Union
International Association of Machinists and
  Aerospace Workers

International Brotherhood of Boilermakers
 and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organization of Masters, Mates & Pilots
National Marine Engineers' Beneficial Association
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

I appear before you today to express the opposition of the membership of RLEA to legislation which seeks to extend the power of federal eminent domain authority to privately owned coal slurry pipeline companies. The most pernicious aspect of this proposal is that it masquerades as a jobs bill. Nothing could be further from the truth. This Act, if passed, will cost jobs, not create them.

The private carriers advantaged by this grant of federal eminent domain authority would direct their efforts at capturing the most profitable long-haul, high-volume coal traffic; traffic traditionally transported by this nation's railroads.

It is our conviction that the passage of such legislation in these times would not be in the public interest generally, and would, in fact, result in a net loss of jobs.

The RLEA has testified many times before on the subject of coal slurry pipeline legislation. S. 267 is very similar to those earlier legislative proposals which have consistently failed of enactment. The record already made on this subject is just about the most complete record available on any piece of legislation ever presented to the Congress. The detailed, substantiated evidence supporting rejection of S. 267 as unneeded by and, indeed harmful to, the public interest we believe to be overwhelming.

The figures and methodology which we use in this testimony are derived from advocates and opponents of coal slurry pipelines, as well as the perhaps more objective conclusions of the 1978 OTA Report.

The impact upon railroad industry employment caused by the existence of coal slurry pipelines must be considered from two aspects: first, the direct impact occasioned by the diversion of coal transport from trains to pipelines resulting in fewer coal trains and therefore fewer on-train jobs and off-train support positions (including car and engine construction lost as a result of the diversion); and, second, the effect of loss of revenues upon a railroad's financial health and the efforts which must be made by that railroad to bring its costs in line with its reduced income. In the railroad industry this situation has historically resulted in severe maintenance reductions by the furloughing of maintenance of way and equipment employees.

The 1978 OTA Report which has been extensively quoted and relied upon by opponents of coal slurry pipelines since its issuance concluded that the five pipelines then being considered for construction would by the year 2000 result in the loss of some 16,000 railroad jobs at a time when employment in the industry would be about 365,660. But employment in the railroad industry is now nearly as low as that predicted by OTA in 1978 for the year 2000, having plummetted from 514,000 in July 1981 to 388,000 in January 1983; a drop of 25% in 18 months. Some 70,000 employees are now on furlough. The Railroad Retirement Board has estimated 1992 employment between 340,000 and 245,000. Consequently, in the year 2000 from about 4.7% to 6.5% of the work force would lose their jobs because of the construction of only 5 coal slurry pipelines. The 1978 OTA Report directly contravenes the self-serving statements of slurry proponents that even with slurry pipelines, 40,000 new railroad jobs will be created by 1995. (Cong. Rec. - Senate, 1/27/83, p. 5464.)

Because of the adverse impact the construction of slurry pipelines would have on railroad employment, at a minimum an amendment to S. 267 is necessary to protect the employees affected by this Act of Congress. Such an amendment is attached to this statement. The proposed amendment would require as a condition of any determination by the Secretary of Energy under Section 4 of the Act, that the applicant provide protection to affected rail employees at least as protective of their interests as the protection afforded in rail consolidation and merger cases under the Interstate Commerce Act.

It is alleged by sponsors of this legislation that this is a jobs bill. It is claimed that construction of planned slurry lines will produce 500,000 new jobs, including 50,000 direct construction jobs and 100,000 jobs in manufacturing. (Cong. Rec., id.) Quite aside from the fact that these types of jobs would be temporary in nature, unlike the permanent railroad jobs which would be lost, the figure itself does not bear analysis when netted against the loss of railroad equipment manufacturing jobs because of diversion of coal traffic to pipelines.

The figure of 500,000 jobs was arrived at by using the Bureau of Labor Statistics input-output methodology. (Id.) Sponsors and proponents took an estimate that $12 billion would be spent on pipeline construction, determined from Department of Commerce statistics what amount would be attributable to labor costs, and divided that figure by the BLS' average wage data in the heavy construction segment of the economy.

However, it is intuitively obvious that the $12 billion will not be spent all at once. As the witnesses here today point out, it is likely that that sum will be spent over a five-year period, and the jobs created will not cumulate. Therefore, even optimistically, all that the expenditure can promise is 100,000 jobs annually for five years. No money related to the construction of slurry lines will exist after that.

Further, using the proponents' figure of pipeline movement of 250 million tons of coal annually, the attendant contraction of coal movements by rail and its adverse effect on rail employment must be netted against pipeline construction job creation. The detailed rail industry analysis before you today correctly points out that diversion will mean that 39,000 rail equipment manufacturing jobs per year for five years will not be created. Absent pipeline construction, the railroads would invest $6.895 billion in hopper car and locomotive construction, and track improvements. This investment would yield 197,000 jobs over five years (using the BLS methodology), or 39,000 jobs annually for five years. This figure must be netted against the overall pipeline construction job figure of 100,000 annually.

In addition, the detailed rail industry analysis based upon the BLS methodology shows that only 22,000 jobs will exist directly on the pipelines over a 30-year period, while 93,000 direct rail jobs over 30 years would be created annually but for the pipelines because rail operations are inherently more labor intensive. These figures are derived by applying the BLS methodology to projected revenues for the movement of 250 million tons of coal annually, which is the amount of coal the pipelines would move annually according to slurry pipeline data. Unit train and slurry pipeline transportation of 250 million tons of coal would yield approximately the same amount of revenue. When the BLS methodology is applied to the revenue f[illegible]ure, the result is that 22,000 annual pipeline jobs would exist if pipelines moved the coal, while 93,000 annual rail jobs would exist if the movement was by unit trains.

It is clear that even assuming immediate construction of all slurry pipelines, which is most unlikely, the net effect of job creation would be definitely on the minus side.

The effects of individual coal slurry pipelines on individual railroad employment could be even more severe if such pipelines were to drive such railroads into reorganization and bankruptcy. In such cases, the employees and this Congress would be faced with future Rock Island, Milwaukee and Conrail situations.

This Committee need not be reminded of the precarious situation in which the Railroad Retirement Trust Fund finds itself. The Congress is currently undertaking to repair the damage done by sharply declining railroad employment with the cooperation and sacrifice of the rail industry--management, employees and retirees. Any further erosion of rail employment occasioned by diversion to pipelines could doom that effort to failure. A necessary revenue bail-out of the Trust Fund cannot be ruled out as a possibility should that occur.

Quite aside from the adverse effect on employment, it is inconceivable thatthe Congress would enact a transportation law thataccomplishes a total bypass of the Interstate Commerce Commission in the proposed certification process. The Secretary of Energy is ill equipped to deal with the weighty common carriage transportation considerations which should be part of this bill procedurally. But this bill grants authority to the Department of Energy without the aid of meaningful transportation standards.

Additionally, once again slurry proponents have attempted to convince state officials that the water within the states through which slurry pipelines pass would be controlled by state water law. Again they have failed. Two recent court decisions, Sporhase v. Nebraska, ___ U.S.___, 102 S.Ct. 3456 (1982) and City of El Paso v. Reynolds, Civ. No. 80-730 MB (D.N.M. 1/17/83) have made clear that a state's water resources are articles in interstate commerce fully subject to the limitations of the Commerce Clause. The provisions of S. 267 merely recognize the existence of state water law, but specifically take away the right of the states to have any "law, practice, or procedure, the effect of which would be to prohibit any acquisition" by federal eminent domain for slurry pipeline purposes. Section 4(e)(1); see also, Section 3(2)(B). So, in fact, S. 267 takes away whatever existing rights the states may have to take the water needs of its citizens into account before granting authority for slurry pipelines to use water in the gargantuan quantities required for their operation.

The testimony and documentary evidence which have been presented to the Congress over the past five years demonstrate conclusively that coal slurry pipelines are not needed; they are environmentally unsound; they deplete already overburdened water resources; they represent a specialized, inflexible use of energy; their construction would contradict established Congressional policy of revitalizing the nation's railroads; and, they would provide private carriers the combined advantages provided private and common carriers without the attendant disadvantages of either. That testimony and evidence also demonstrate that railroads can meet the increase in demand for coal transportation at rates probably lower, but at least comparable to pipeline rates; and, that railroads are at least as energy efficient, if not more energy efficient, than pipelines.

However, if pipelines are afforded federal eminent domain authority, railroads will be placed at a disadvantage that seriously will handicap their ability to compete. The only way to avoid the destructive competition which would result from private coal slurry pipeline companies' use of eminent domain authority is to recognize now that pipelines do not offer needed or improved coal transportation, while at the same time, they would undermine the financial stability and service availability of the nation's railroads. We respectfully submit that that is too high a price to pay for an alternative system of transportation that can produce no measurable improvement over what can be provided by the existing railroad system.

In closing, I would like to refer this Committee once again to the detailed report issued in 1978 by the House Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce following extensive hearings on H.R. 1609, one of the many predecessors of S. 267. That report concluded: "Federal promotion of coal slurry pipelines in the manner contemplated in H.R. 1609 would undermine the national transportation policy and, with it, the system of common carriage."

Thank you for this opportunity to present to you the views of the RLEA on this important subject.

AMENDMENT TO S. 267

Page 6, line 10, after the period insert the following:

> The Secretary shall not determine that construction of such system shall be in the national interest unless his determination requires that the applicant provide a fair arrangement for the protection of employees of rail carriers affected by the issuance of such determination, including terms at least as protective of the interests of such employees as the terms required under section 11347 of Title 49.

The CHAIRMAN [presiding]. We will now hear from James Miller.

Mr. MILLER. Thank you, Mr. Chairman. I have a very brief statement I would like to make and submit the whole statement.

The CHAIRMAN. The entire statement will be placed in the record.

STATEMENT OF JAMES MILLER, ASSISTANT LEGISLATIVE DIRECTOR, THE NATIONAL GRANGE, WASHINGTON, D.C.

Mr. MILLER. We have four concerns with the bill before the committee today.

First off, as I testified last year on the issue of the eminent domain, we are concerned that we would be, "we" meaning ranchers and farmers across the country, would be the subject of eminent domain proceedings at least as frequently as the railroads are, and probably much more. I don't want to belabor that position at all. Suffice it to say that we look at the possibility of facing an eminent domain proceeding much as we would any other action that would inhibit the growing of crops or the raising of livestock or whatever. It is a bother. It is a potential hassle all the time. Fences are hard to maintain that way. It is difficult to tell who is on your property, whether it is officials with the utility, or trespassers. It is always a problem.

Our second concern, of course, is the water availability and the effect that water supplies and allocations could possibly jeopardize those existing allocations out in the country. You may convince yourselves as a committee that you have solved the problems with the water availability, but I daresay you will have a difficult time convincing the folks out in the country that they have nothing to worry about. I suppose that had some of our members sat and witnessed the panel this morning they would have learned a good deal about water law, but they would have walked away very nervous, and I think rightfully so, because it has been described as murky, and I think that is as good a way to describe it as any.

Equally murky I think, are the third and fourth concerns that we have with the coal slurry pipeline, and that is the potential effects that it might have on the infrastructure in the country that supplies the goods that farmers and ranchers consume as well as transport that which they produce. It is a part of the statement that was read in Senator Danforth's hearing by the Federal Railway Administrator that the possibility of raising the bulk rate is only one of the things that we would have to worry about. The second one may be a problem for the pipelines as well. If it is a problem now, it could only get worse if the major mortgage payer, that is coal, were taken from the railroads. I am not here to plead the case of the railroads because I represent an organization that cut its teeth fighting the railroads on an issue that might possibly resemble very clearly what some of the utilities have alleged, that the railroads have been pricing them out of business.

My job here is to represent the interests of the ranchers and farmers. I would like to make a suggestion that this committee seek to gain all available information that is out there. We are aware that the USDA Office of Transportation has studied possible impacts that coal slurry lines would have on the rural part of the country. I would urge you to request Secretary Block to release this report. He has not, at least to my knowledge anyway, made this report public. We would like to take a look at it, as I am sure many of you would, and I think it would behoove this committee to make whatever decision it is going to make in full light of all the facts that are available.

Senator FORD. Mr. Chairman, could you assist us in securing that report?

The CHAIRMAN. I don't know. I'll see.

Senator FORD. How do we go about doing that?

The CHAIRMAN. You will have to talk to the Secretary about it obviously.

Mr. MILLER. Thank you, Mr. Chairman. That concludes my remarks.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JAMES MILLER, ASSISTANT LEGISLATIVE DIRECTOR, THE NATIONAL GRANGE, WASHINGTON, D.C.

Mr. Chairman and Members of the Committee:

On behalf of the National Grange and the 425,000 Grange members in 41 states, I am pleased to offer our comments on S.267, the Coal Distribution and Utilization Act.

Last year I had the opportunity to appear before this committee to testify in opposition to a similar proposal before the 97th Congress. At that time I submitted for the record a series of documents that bore out what farmers, ranchers, and other rural landowners suspected: federal eminent domain authority would be a tool used against us as well as a means to cross railroad property. My hope at that time was to bring to the attention of this committee the fact that the coal slurry debate should not be portrayed as a battle between railroads and slurry proponents. While nothing in this bill would lead us to change our position on how eminent domain authority will be used against the farmer and rancher, I'll not take the committee's time to restate that position in detail. Suffice it to say this: federal eminent domain authority is but the first of four threats that this legislation poses to agriculture.

Our second concern centers on problems that slurry lines pose to Western water supplies and allocations. You, Mr. Chairman, understand this issue far better than I by virtue of your distinguished career in practicing water law. I do not profess to understand the details of this issue, but I can assure you of this fact: nothing could make a farmer or rancher in the western states more nervous than the idea of entrusting their water -- their lifeblood -- to Congress. You may convince yourselves that you have solved problems associated with using scarce water resources to transport coal across the country, but I daresay that you will have one difficult time in convincing those farmers and ranchers that they should not worry.

Western ranchers and farmers know what it costs to hire a good water attorney to protect their claims; they know that there are more uses for water than there is water to be had. They do not understand why we would be foolish enough to take such a precious resource and use it for coal transportation instead of using it for food and fiber production. If this bill passes somebody will have to answer that question, and I frankly cannot.

The Grange's third concern over coal slurry pipelines involves the potential impacts they might have on rail transportation in rural areas. Exhaustive hearings were held last session on this subject by your committee and by the Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation. At these latter hearings, witnesses from USDA's Office of Transportation and from the Federal Railroad Administration testified on the potential impacts slurry lines could have on agriculture.

Robert Blanchette, FRA Administrator, developed this scenario of events that occurs when railroads face bankruptcy. First, to paraphrase, he said that railroads defer state and local taxes. Second, they begin to abandon light density lines. And third, the scenario continues, they raise the rates for bulk commodities which are "noncompetitive" in nature. I need not explain that the shipment of grain in many areas is noncompetitive.

Senators, these are our third and fourth objections to coal slurry lines. They will result in higher transportation costs to many farmers, and those farmers will be in jeopardy of losing rail service to their local elevator and suppliers by abandonment.

This question of competition in freight transportation is a puzzling one. The Administration's position, unless it has changed by now, supports coal slurry lines and suggests that they be allowed to compete with railroads "on their own merits." But there will be commodities left that are noncompetitive, and they will be the ones to bear the entire burden of freight cost adjustments. Rural areas, which depend on rail transportation for the supply of many good which they purchase and that which they produce, must be factored into this competitive equation. Enhanced competition in one solitary commodity transport could throw an entire transportation network, locally and regionally, into disarray.

Wouldn't it be much wiser to take an integrated approach to the policy issue in question today? Let's expand the scope of this analysis to include the volitility of the rural economy -- one based primarily on agriculture -- into account. I believe, on balance, that a sound public policy would be one that discourages some competition if the result is a stable transportation network.

I am not here to plead the case for the railroads. My organization in its infancy cut its teeth on fighting the railroads for equitable and reasonable freight rates. What the railroad have done to coal transport rates is probably quite similar to the cause which the Grange championed before the turn of the century. In all likelihood, the utilities have a right to seek relief.

But I am here to plead the case for agriculture and rural interests. And I am convinced that farmers, ranchers, and rural land and water users will again be forced to pay the price for the railroads' pricing actions if you report out this bill.

Let me suggest this. I am aware that the USDA Office of Transportation has again taken a look at this issue. I believe that the committee should request Secretary Block to release this new study, and he should be called to report its findings to you before action is taken on the bill. This question is too serious, too widespread in its impact, to be decided without all the pertinent information that is available.

Let me again thank you for this opportunity to appear before you to offer the Grange's position on S.267. I would be pleased to answer any questions you might have.

The CHAIRMAN. Senator Johnston?

Senator JOHNSTON. Mr. Chairman, I don't have a lot of questions because these witnesses told us about the same things last year, and we had questions last year and I suspect the answers would be very much similar.

I can only congratulate this panel. They have got a tough, tough case and they have done a marvelous job with a very weak case. When I heard Bill Dempsey talk about monopoly and the fact that 85 percent of the coal is captive shippers, by the time he finished describing that, it sounded like you have got competition on every line in America. I almost believed it except I realize that there is in fact only one railroad for about 85 percent of the lines.

If I had a monopoly, I would want to keep it. I mean that's the good old American way—apple pie. You keep it until the Congress asserts a greater national interest which I think we have in this case.

With respect to the sickness that the Railway Progress Institute, talked about, Mr. Dwyer, certainly that wasn't due to coal slurry pipelines. It might have been due to the Congress or the Executive or whatever, but it wasn't due to coal slurry pipelines. Your statement runs counter to the general situation in railroads because railroad profits are at their highest level in more than 30 years, and I'm glad that's true. I imagine there may not be any new coal conversions being made now. As a matter of fact, I suspect not one single one has been made since the Staggers Act has passed.

Am I correct on that?

Mr. DEMPSEY. Coal conversion, sure, but I would want to say our profits in 1980 were the highest level. That is to say, we crashed the sound barrier at 4 percent. Right now they are back again at less than 2 percent.

Senator JOHNSTON. That is 2 percent of what?

Mr. DEMPSEY. Net investment.

Senator JOHNSTON. All right.

Mr. DWYER. Just in response to your raising the issue——

Senator JOHNSTON. That includes Conrail, too, doesn't it?

Mr. DEMPSEY. Yes. Well, it is a fair point, but let me say that there is no railroad, no railroad that has—certainly this year there won't be any probably above 6 percent, but even in 1980 there weren't any major railroads above 9 or 10 percent.

Senator JOHNSTON. Based on replacement cost?

Mr. DEMPSEY. No. This is based on original cost.

Senator JOHNSTON. Net original cost?

Mr. DEMPSEY. Yes.

Mr. DWYER. Just in response to the issue that you have raised, with regard to our industry, you certainly are correct, that our current situation has not been caused by coal slurry pipelines at all. I think that rather aptly demonstrates, though, the situation in which we find ourselves, and if we find that coal slurry does take as much as 30 percent of current railroad coal which I think is a fairly reasonable assumption, we certainly are going to be in a much worse situation than we currently are.

Senator JOHNSTON. Unless you can get utilities to have the confidence in freight rates to start making plant conversions they will never start using the coal; I think that is the problem right now.

Utilities are afraid that the same thing is going to happen to them which has happened down in San Antonio and Tampa, Florida, and elsewhere, where the extortionate rail rates rose to such high levels after the conversion was made. Other utilities wouldn't dare put in a coal-fired boiler because they are going to be subject to the same monopoly power of the railroads. I think that is the problem, and I think that if you have a competitive situation it will not hurt the railroads. To the contrary, it will make them competitive and you will have a bigger pie to divide both ways. At least that is what I believe.

I don't expect to be able to convince Bill Dempsey of that, but that's what I believe. Now with respect to jobs, there are all kinds of studies on these jobs. It depends on whose study you use. If you want to use the Department of Energy's study, National Energy Transportation Study, it indicates that if all the coal slurry pipelines currently under consideration are built and operated at full capacity, they would be able to carry 176 million tons by 1990. This amounts to 19 percent of the increase in coal haulage and 13 percent of the total amount of coal haulage. So in effect what that study says is that coal slurry pipelines would have a very small impact on the projected haulage of the domestic coal industry.

Now where they might have a very big effect is on the amount of additional increase in profits because the ICC under their latest ruling, will allow railroads to raise rates at a level of 15 percent per year plus inflation. According to that decision, the 15 percent you didn't use last year is available to use this year along with this year's 15 percent plus inflation. That is enough to discourage any sane utility from converting to coal if they had a choice.

I know we have got a lot of other witnesses so I won't ask any more questions.

The **Chairman**. Senator Ford.

Senator **Ford**. Mr. Chairman, I don't think I have any questions. I think Senator Johnston is a little bit off the point when he says they make a good case of a weak point. I think he is going to find out they have a very strong point before it is over with.

Mr. Dempsey, the profit that was made in the railroads in that one year that Senator Johnston refers to, was there a tax break? It was given accelerated depreciation in that period. I am trying to recall.

Mr. **Dempsey**. Not really, Senator. For the first time in 1980—for two and a half or three decades, the industry was looking with some reasonable degree of optimism to the future, and the impact, that was due to a number of considerations. Staggers was part of it, but after all, when you are talking about a 4-percent rate of return on this investment and you have got to triple that to get to a reasonable rate of return, you are an awful long way from home. The next year fell off somewhat, and then, of course, this past year it is down as I say to under 2 percent.

Senator **Ford**. I have found our rates particularly in the London area of Appalachia to be declining.

Mr. **Dempsey**. As I indicated, you may not have been here, but they have declined in the last 6 months of 1982. The coal rates went down.

Senator **Ford**. I'm sorry. I wasn't here, but I find they are declining, and are very competitive under the situation.

Mr. **Dempsey**. In 1982 the increases were the lowest in 9 years. In the last 6 months of 1982, they actually declined.

Senator **Ford**. I thank you, Mr. Chairman.

The **Chairman**. Mr. Miller, you indicated that farmers were going to be confused about the water issue. Certainly we had enough lawyers here to confuse anyone, which is often the case around here, but you were here and heard all that panel this morning?

Mr. **Miller**. Yes, sir.

The **Chairman**. Did it come through to you that the consensus opinion of all of them was that if the pipeline succeeded in building pipelines, regardless of whether they have eminent domain or not, that there is a question about whether the commerce clause overrides the provisions of state law with respect to the acquisition of water rights?

Mr. **Miller**. If this is a test, I'm going to fail! I'm afraid I don't—I'm not sure I can respond to that. I didn't understand the issue basically.

The **Chairman**. Maybe all the lawyers succeeded better than they thought.

Mr. **Dempsey**. Could I respond, Mr. Chairman? I agree with what you say, sitting here and listening to that panel on that point.

On the other hand, it seems also to be clear that they were of the common opinion that if the intent here was to give the State of Montana the right to prohibit the exportation of water for coal slurry pipelines, that this law on its face probably doesn't do it, and so I think you can draw those two conclusions, and what I said before was if this committee and its staff, with all the effort that has been put into this, can't write the statute that clearly does that, and all the time that has been spent on it, it testifies to the difficulty if not the impossibility of performing that task.

The **Chairman**. And I guess then the constituents out there judge us both on our effort and on our competence to be able to do it.

Senator **Johnston**. Mr. Chairman, I don't think they said quite that. I think they said the statute with its legislative history would support the Montana statute. I believe that is what Dean Trelease said and also Mr. Clyde.

Mr. **Dempsey**. The dean said sometimes courts look at legislative history and sometimes they won't, as I recall, and so there you are.

Senator **Johnston**. That was——

The **Chairman**. It doesn't matter who it was. So far as the Chair is concerned, we will stipulate the courts do what they damn please, and if they please to look at legislative history, they do. If they please not to, they don't. If they please to look at the statute, they do. If they please not to look at the statute, they don't, so I think we can stipulate that there is some uncertainty as to what the court will do.

As someone once responded, the Supreme Court is not infallible, is not final because it is infallible. It is infallible because it is final, and I think we all who have had some experience with them understand that that is correct, so my only point is that certainly the panel of experts as I got it said, absent a statute, you are in trouble. With the statute you are in trouble. With this statute, unperfected, you are in trouble, but you will probably perfect this statute to do better than you are doing with it now, which I also got from them by a 4 to 1 margin, that we could make the statute better than existing law, and whether we will do that I don't know. I am going to put my effort to doing that.

If the legislation passes, it will improve upon where the western farmers find themselves in the threat of the loss of their water; I am not going to just sit and say gee, guys, that's too bad, fellows. Somebody is going to take it away from you and there is nothing you can do about it.

Mr. DEMPSEY. Mr. Chairman, I would suggest that you will probably want to do it irrespective of this legislation. In other words, we would urge that you consider that in all of the broad aspects.

The CHAIRMAN. I understand—better than you intended. Are there further questions of this panel? If not, thank you gentlemen very much.

The next and final panel will be Mr. Frederick Webber, executive director of the Edison Electric Institute; T. Justin Moore, chairman of the Virginia Electric Power Co.; Lynch Christian, Jr., president, Imperial Colliery Co., and others; Alex Radin, vice president, Consumer Federation of America; Robert A. Georgine, president of the Building and Trade Department, AFL-CIO.

Gentlemen, I hope you will not feel picked upon if I do something with you that we haven't done with some of the others. I am going to ask you to file your statements and they will appear in full in the record, and I will ask you if you can summarize those statements in about 5 minutes. I suspect if you don't avail yourselves of that opportunity you are going to lose whatever audience you have here completely.

With that, if I may then call on Mr. Webber.

STATEMENT OF FREDERICK L. WEBBER, EXECUTIVE VICE PRESIDENT, EDISON ELECTRIC INSTITUTE AND VICE CHAIRMAN, ALLIANCE FOR COAL AND COMPETITIVE TRANSPORTATION, WASHINGTON, D.C.

Mr. WEBBER. Thank you, Mr. Chairman. I would like permission to quote from Senator Johnston's statement delivered on the Senate floor on January 27 when this bill that we are talking about today was introduced, and I do that because it is concise, to the point, we think accurate, and it speaks for itself, and I quote:

> This legislation fits every theme of both the President's State of the Union Message and the firm Democratic response. This legislation will create jobs. It will create a new industry that will preserve America's technological leadership, enhance the competitive position of American coal in the world market, encourage energy self-sufficiency by increasing the marketability of American coal both here and abroad, and reduce the economic burden on our people by holding down the delivered price of coal to our Nation's electric generating facilities and industries.

I think basically, Mr. Chairman, that is our position, and that is why we are strongly behind the bill.

Before you today is T. Justin Moore, chief executive officer of Virginia Electric Power Co. He will talk about the need for coal pipeline legislation and really get into what happened I guess in the Virginia Legislature.

Bob Georgine is here as president of the Building and Construction Trade Department of the AFL-CIO. He is going to address the jobs aspect of the coal slurry pipeline proposal to which Senator Johnston referred on the floor.

Lynch Christian is here as the head of the Imperial Colliery Co., and he is going to talk about the need for Federal coal pipeline legislation and the unsuccessful effort to obtain pipeline legislation again in the Virginia Legislature, and finally, Alex Radin is here in his position as the vice president of the Consumer Federation of America and he will talk about consumer impact of the pipeline, and if the panel agrees, I would defer to one of my many, many, many bosses in the institute, Mr. Moore.

[The prepared statement of Mr. Webber follows:]

PREPARED STATEMENT OF FREDERICK L. WEBBER, EXECUTIVE VICE PRESIDENT, EDISON ELECTRIC INSTITUTE AND VICE CHAIRMAN, ALLIANCE FOR COAL AND COMPETITIVE TRANSPORTATION, WASHINGTON, D.C.

Mr. Chairman and Members of the Committee, I am Frederick L. Webber and I am here today as Vice Chairman of the Alliance for Coal and Competitive Transportation (ACCT). I am also the Executive Vice President of Edison Electric Institute, the association of investor-owned electric utilities. We appreciated the opportunity to appear before you last year in support of S. 1844 and are pleased to appear today in support of S. 267, which is virtually identical to the version of S. 1844 that was reported by your Committee last August.

We are a broad coalition, as the attached membership list indicates. We are comprised of groups that often disagree on the major energy issues that face our nation. Nevertheless, we are united in our strong support for S. 267, because we are convinced that this legislation: (1) will provide much needed competition in coal transportation; (2) will help to moderate the increase in the cost of electricity; (3) will provide a chance for a major new industry to be developed in our nation; and (4) will provide our nation with a modern mode of transportation that will allow our domestic coal resource to compete in international markets.

Mr. Chairman, we are not convinced that every proposed coal pipeline actually will be developed. Under this legislation, the states will decide which pipeline will obtain water and at what price. The Secretary of Energy will decide which pipelines may use federal eminent domain authority. And - most importantly - the market will decide which proposed pipelines are economically feasible. However, we are convinced that the very enactment of this legislation will provide a new element of competition in coal haulage and that the efforts to develop individual pipelines will provide substantial benefits for our domestic economy.

Mr. Chairman, we are not unmindful of the political difficulty of this issue. Many of our member groups endured internal struggles among their membership before deciding to support this legislation. But we believe this legislation is in the national interest and that supporting the bill is the right course of action. We encourage you to report S. 267 quickly so as to assure that this proposed legislation is given an opportunity to be debated on the Floor of the Senate as soon as possible.

Mr. Chairman, I am pleased to present to the Committee the following panel of witnesses:

T. Justin Moore, Chairman of Virginia Electric Power Company, who will testify on the need for coal pipeline legislation as well as report on the unsuccessful effort to obtain coal pipeline legislation in the current session of the Virginia legislature.

Robert A. Georgine, President of the Building and Construction Trade Department of the AFL-CIO, who will address the jobs aspect of the coal slurry pipeline proposal.

Lynch Christian, Jr., President of Imperial Colliery Company, Milburn Colliery Company and Imperial Coal Sales Company. Mr. Christian is a coal producer headquartered in Lynchburg, Virginia, and will address the need for Federal coal pipeline legislation and the unsuccessful efforts to obtain coal pipeline legislation in the Virginia legislature.

Alex Radin, Vice President of Consumer Federation of America and Executive Director of American Public Power Association, will testify on the positive consumer impacts of coal slurry pipelines.

* * *

ALLIANCE FOR COAL AND COMPETITIVE TRANSPORTATION
February 1983

National Organizations

American Association of Retired Persons
American Consulting Engineers Council
American Mining Congress
American Public Power Association
Building and Construction Trades Department, AFL-CIO
Coal Exporters Association
Coal Fuel Mixtures Association
Consumer Federation of America
Eastern Coal Transportation Conference
Edison Electric Institute
International Brotherhood of Teamsters
International Union of Operating Engineers, AFL-CIO
Laborers International Union of North America, AFL-CIO, CLC
Mining and Reclamation Council of America
National Alliance of Senior Citizens
National Coal Association
National Rural Electric Cooperative Association
National Society of Professional Engineers
Pipe Line Contractors Association
United Association of Plumbers and Pipefitters, AFL-CIO
Slurry Transport Association
Western Coal Traffic League
Western Fuels Association, Inc.
Youth for Energy Independence

State Associations

Arkansas Electric Co-op Corporation, Little Rock, Ark.
Association of Louisiana Electric Cooperatives, Baton Rouge, La.
Cajun Electric Cooperative, Baton Rouge, La.
Central Pennsylvania Coal Producers' Association, Ebensburg, Pa.
Coal Operators and Associates, Inc., Pikeville, Ky.
Coal Producers Association of Illinois, Springfield, Ill.
Colorado Mining Association, Denver, Colorado
Florida Federation of Women's Clubs
Illinois Coal Association, Springfield, Illinois
Indiana Coal Council, Indianapolis, Ind.
Kentucky Coal Association, Lexington, Ky.
Keystone Bituminous Coal Association, Pittsburgh, Pa.
Logan Coal Operators Association, Lundale, W.Va.
North Dakota Lignite Council, Bismarck, N.D.
Ohio Mining and Reclamation Association, Columbus, Ohio
Pennsylvania Coal Mining Association, Harrisburg, Pa.
United Power Association, Elk River, Minnesota
West Virginia Coal Association, Charleston, W.Va.
West Virginia Surface Mining and Reclamation Association

Additional Supporters of Coal Pipeline Legislation

-Non-ACCT Members-

Associated Builders and Contractors, Inc.
Council of Energy Resource Tribes
National Association of Manufacturers
National Association of Regulatory Utility Commissioners
National Constructors Association
National Industrial Transportation League
National Utility Contractors Association
The New England Council, Inc.

Mr. MOORE. Thank you, Mr. Chairman. I will avail myself of your offer and file my statement for the record and keep my remarks in summary form within the 5 minutes that you suggested.

Senator WARNER. Mr. Chairman, if I might interrupt to basically introduce this distinguished Virginian—we have been friends and colleagues for more years than we would like to remember, and it is a misfortune that we find ourselves on different sides of this issue.

Nevertheless, I would urge the members of this committee to heed carefully the wisdom of this gentleman. I know he is eminently qualified to speak to the issue.

Mr. MOORE. Thank you. I hope I can get the majority, and I will understand our differences.

The CHAIRMAN. That didn't come out of your time!

STATEMENT OF T. JUSTIN MOORE, JR., CHAIRMAN OF THE BOARD, VIRGINIA ELECTRIC & POWER CO.

Mr. MOORE. Thank you very much, Senator Warner and Mr. Chairman. The Virginia Electric & Power Co. is generally known as VEPCO, and we became interested in coal slurry pipelines several years ago when we began what has now become the country's largest conversion program in oil to coal.

Prior to the Arab oil embargo of 1973, our company produced 50 percent of its energy with oil. After the OPEC embargo of October 1973, and oil prices began to skyrocket, we began a massive shift to coal. To date, we have converted 1.8 million kilowatts of capacity from oil to coal, as I mentioned, the largest conversion program of any utility in the country, and we have saved our customers hundreds of millions of dollars.

In doing so, last year our oil usage was down to 4 percent compared to over 50 percent in 1972. As a result of further coal conversions we have planned, our coal use will increase from 3.7 million tons last year to some 6 million tons a year by 1986. By that time, we figure our conversion program is expected to save our consumers $400 million annually.

In contrast to these savings, our coal freight rates that our customers eventually pay increased by 24 percent in the 2 years between deregulation and the end of 1982. Transportation cost at the present time amounts to 36 percent of our total coal cost. Based on the cost of coal delivered in the study done last year for us at the Virginia Polytech Institute, we estimate that a slurry pipeline in Virginia could save our customers as much as $60 million a year initially and more in future years.

VEPCO has been joined in its effort to build a coal slurry pipeline by Transcontinental Gas Pipeline of Houston, Tex., which has experience in both the coal and pipeline businesses. We are jointly interested in building a pipeline from the Appalachian coal fields of southwestern Virginia to the port of Hampton Roads, but of course, we need to put together a right-of-way to do that. That is something we do as a matter of course in the electric business. It is something that Transco does as a matter of course in its gas business, but under present law, we are unable to do it for a coal slurry pipeline.

President Reagan in his November 1981 statement observed that coal slurry pipelines should be allowed to compete on their own merits as contributors to improving America's energy situation, and he went on to say that is is, quote, ". . . clearly contrary to the national interest for private parties such as railroads to thwart projects beneficial to the Nation simply for their own parochial purposes."

Contrary to the President's intention, the national interest has in my opinion been thwarted by the railroads in Virginia. I will not recite it in detail, but on pages 4, 5, and 6 of my prepared remarks I review in detail the legislative history that occurred in Virginia in the last 2 years and you will see that every effort to secure the passage of coal slurry eminent domain legislation has been successfully thwarted by the railroads.

We are now studying the situation in Virginia, and frankly, we were very lucky to escape the last session of the Virginia Legislature last month with a study resolution.

Our experience in Virginia, Mr. Chairman, vividly demonstrates to me the difficulty of relying on State action to unleash the potential of coal pipelines. In the circumstances we have experienced, we can expect the thwarting of the national interest that we have seen in Virginia to occur again and again. Without national legislation, we can at best expect substantial delays, and at worst, abject failure.

I will wind up by suggesting one amendment to this bill. S. 267 is such an excellent bill that I really hesitate to suggest any change at all, but I would urge that subsection 3-2 (b) be amended to apply to any State rather than simply the State of Alaska. This subsection would then provide that a pipeline would be deemed to be in interstate commerce if some of the coal moving in it was delivered to a port in the same State for shipment to another State or for export. That amendment would place the proposed Virginia coal pipeline in interstate commerce as it will be in fact.

We envision this pipeline coming from southwest Virginia to the great port of Hampton Roads, and much of the coal will be sent to other utilities up and down the east coast, and incidentally, they have evidenced strong interest in this, and some will also be sent overseas.

Under those circumstances, we think we should be included, Senator Johnston, in the same category as Alaska. I think Virginia and Alaska are probably the only two States that have that unique combination of the coal plus the export facilities, so it would not be a widespread application.

I will conclude, Mr. Chairman, by saying that Congress does not need to decide that the benefits from coal pipelines will in fact be realized. You need only decide I submit that they are potentially available. With that determination and the standard required to protect the public interest, you can rely on the economics of the marketplace to determine whether coal will move by pipeline, by rail, by barge, by truck, by any other means.

If competition in coal transportation is in the national interest, and I firmly believe it is, we need national legislation. If we are to avoid needless and costly delays, we need it this year. I am convinced this legislation will benefit not only VEPCO's customers, but the customers of many other utilities in a very significant way.

Thank you.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF OF T. JUSTIN MOORE, JR., CHAIRMAN OF THE BOARD, VIRGINIA ELECTRIC & POWER CO.

Mr. Chairman, I am T. Justin Moore, Jr., Chairman of the Board of Virginia Electric and Power Company.

I welcome the opportunity to appear before you today and I commend you and the Committee for taking up this important issue early in the new session.

Vepco became interested in coal pipelines several years ago as a means of lowering our cost to customers, aiding our conversion from oil to coal and helping the economic development of the three-state area we serve. Any savings that we can achieve in the cost of fuel, including transportation savings, pass directly to customers.

In 1972 Vepco produced 50 percent of its energy supply from oil.

As oil prices soared, we began a massive shift to coal. We have already converted 1.8 million kilowatts of capacity, saving consumers hundreds of millions of dollars. Last year Vepco's oil usage was down to 4 percent.

As a result of further coal conversions, our use of coal will increase from 3.7 million tons last year to 6 million tons a year by 1986. By this time, our conversion program is expected to save our customers 4 hundred million dollars annually. In contrast to these savings, coal freight rates that our customers eventually pay have increased by 24 percent in the two years between railroad deregulation and the end of 1982. Transportation costs now account for about 36 percent of our cost of coal.

Based on costs developed in a study at Virginia Tech, we estimate that a pipeline could save our customers as much as 60 million dollars a year initially and more in future years.

Vepco and Transco Energy Company, which has experience in both the coal and pipeline businesses, are interested in building a coal pipeline from the coalfields of southwest Virginia to the port of Hampton Roads. But of course we need to be able to put together a right of way. That is something we do routinely in our electric business and Transco does routinely in its gas business. But we are prevented from doing it for a coal pipeline.

President Reagan did say in his November, 1981 statement that "coal slurry pipelines ... should be allowed to compete on their own merits as contributors to improving America's energy situation." And he went on to say that "it is clearly contrary tp the national interest for private parties such as railroads, ... to thwart projects beneficial to the nation simply for their own parochial purposes."

Contrary to the President's intent, the national interest has been thwarted by the railroads in Virginia.

In the 1982 session of the Virginia General Assembly, we sought a legislative study of removing Virginia's prohibition of the right of eminent domain for coal pipelines. The study resolution passed the House but was killed by the railroads in last minute maneuvering in the state Senate.

In the absence of a legislative study, the Virginia Coal and Energy Commission agreed to study the issue during 1982. That effort was frustrated by the railroads.

Last fall, we undertook a scientific poll of public opinion in Virginia and found a strong majority of Virginians in favor of competition in coal transportation. The survey also showed that, when presented with arguments for and against coal pipelines, Virginians support the concept by an impressive margin of 7 to 2.

We then developed legislation that would have permitted a grant of eminent domain authority only if the Virginia State Corporation Commission determined that a coal pipeline met standards designed to protect the public interest. Independently, legislators from Virginia's coal producing area introduced legislation to simply repeal the prohibition in Virginia law on the use of eminent domain by coal pipelines.

Both bills were killed in committee. While they were pending the railroads had called instead for a legislative study. Once the bills were dead, we had to fight hard to win passage of a study resolution.

Mr. Chairman, our experience in Virginia vividly demonstrates the difficulty of relying on state action to unleash the potential of coal pipelines.

In these circumstances we can expect the thwarting of the national interest that we have seen in Virginia to occur again and again. Without national legislation, we can at best expect substantial delays in opening the way for competition in coal transportation and, at worst, abject failure.

S. 267 is such an excellent bill that I hesitate to suggest any change. However, I would urge that Subsection 3(2)(B) be amended to apply to any state, rather than to Alaska only.

This subsection would then provide that a pipeline would be in interstate commerce if some of the coal moving in it was delivered to a port in the same state for shipment to another state or territory of the United States or for export.

This amendment would place the proposed Virginia coal pipeline in interstate commerce, as it will be in fact. A considerable part of the coal transported in the proposed Virginia pipeline would be destined for utilities and other users along the East Coast and for overseas markets.

Fostering competition and lower costs is as much in the national interest for coal shipped partly by pipeline and partly by barge to other states as for coal shipped wholly by pipeline.

With the recent decision of the Interstate Commerce Commission to deregulate coal shipped by rail for export, there is an even greater need for competition in transporting coal from southwestern Virginia to Hampton Roads.

In the absence of the amendment, Vepco and Transco would have to consider beginning our coal pipeline in West Virginia. This is technically and economically feasible and would provide the benefits of a coal pipeline to Vepco's customers.

However, it would place Virginia's coal producers at a considerable disadvantage. They already complain that Vepco uses too little Virginia coal.

However, our obligation to our customers requires us to obtain coal at the lowest delivered price and high freight rates from Virginia's coal producing areas allow us to get coal more cheaply from other states.

We would welcome the opportunity to use more Virginia coal but S. 267, unless amended, would make it even more difficult for us to do so.

I believe this amendment would not have far-reaching effects since few, if any, states other than Alaska and Virginia have the combination of coal producing areas and ports that would make the provision relevant.

Mr. Chairman, Congress does not need to decide that the benefits expected from coal pipelines will be realized — only that they are potentially available. With that determination and with standards required to protect the public interest, you can rely on the economics of the marketplace to determine whether coal will move by pipeline, by rail, by barge or some other means.

If competition in coal transportation is in the national interest, as I firmly believe it is, we need national legislation. If we are to avoid needless and costly delays, we need it this year. I am convinced that the legislation will benefit Vepco's customers and the customers of many other utilities in a very significant way.

Thank you.

# # #

The CHAIRMAN. Thank you.
Mr. Christian.

STATEMENT OF C. LYNCH CHRISTIAN, JR., PRESIDENT, IMPERIAL COLLIERY CO., MILBURN COLLIERY CO., AND IMPERIAL COAL SALES CO., LYNCHBURG, VA.

Mr. CHRISTIAN. Mr. Chairman, members of the committee, I am pleased to appear here before you in support of S. 267. My name is C. Lynch Christian, Jr., and I am a lifelong resident of Lynchburg, Va. I am president of three small coal companies.

Senator WARNER. Another acquaintance of longstanding, and I regret somewhat to be at odds with him here, but again, his knowledge is such that I hope the committee pays very close attention.

Mr. CHRISTIAN. Senator, I hope that you will listen to some of my remarks.

Senator WARNER. Each time I extend senatorial courtesy, I get in more trouble here!

Mr. CHRISTIAN. Our three small coal companies are located, headquartered in Lynchburg, but our operation is in West Virginia. Let me briefly describe our position in the industry.

Producing companies date from 1901 and 1957, and our sales company from 1913. Last year we produced only about 300,000 tons of coal, and this is down somewhat from a high of 1 million tons some years ago. The coal was marketed to industrial concerns in North Carolina, Virginia, and West Virginia. Neither our producing properties nor our noncontiguous reserves are immediately accessible to water transportation. Accordingly, we are dependent upon truck and rail transportation from the mine site and are now finding it necessary to move some of our coal by truck over distances as great as 150 miles in order to be competitive.

Now, Mr. Chairman, I can't say with certainty that the coal my company produces now or intends to produce in the future will be moved by coal pipeline. In fact, it has been argued that small producers will suffer rather than benefit from coal pipelines. In my view, however, the problem should not be any greater than those we experience today in obtaining access to railroad transportation, and we do experience difficulty at this time.

Furthermore, I am convinced that small operators have a, will have a far greater opportunity to access coal pipelines than they have for taking advantage of unit train rail rates. Frankly, I expect criticism from my railroad friends for appearing here on behalf of this legislation. I have a strong interest in seeing the addition of another efficient alternative to our present long-haul coal transportation system to which small producers such as Imperial and Milburn can have access.

I am here to urge you to act expeditiously in reporting S. 267. The reason is simple. Our country badly needs, one, greater competition in coal transportation, and two, a new and progressive mode for coal delivery, and we need it now. The coal industry in our country is in a state of depression. Among our domestic fuels coal has great advantages. Our supply is vast and secure as well as stable in price as mined and prepared for shipment.

However, increasing railroad rates are undermining coal's cost advantage by significantly raising the delivered price of coal, making it more and more difficult to market our coal both domestically and internationally. The attached chart will give you some idea of the relative changes that have occurred in recent years. It shows each percentage change in rail rates and our coal selling price to an actual customer since December 1975.

The effect of competition in the coal sector and its relative absence in the transportation sector is obvious. We have selected December 1975, rather than the usual 10-year history because if we had gone back further we would have gotten into a period of time when coal prices were affected considerably by the Arab oil embargo and we didn't think that that was a reasonable comparison to make. It would make it even worse than it is, as a matter of fact.

The enactment of S. 267, Mr. Chairman, will encourage companies in the private sector to develop coal pipelines that will compete effectively with railroads for coal transportation. The very fact of enactment of this legislation will immediately generate a degree of competition in coal haulage rates that is generally nonexistent today. With eminent domain, coal pipelines undoubtedly will be constructed. Obviously they can only complement or supplement, not replace, railroads or other carriers.

More importantly, I do expect them to provide much needed competition in this era of deregulation, benefiting all ultimate consumers of the coal and our industry's competitive position in international coal trade.

Frankly, I do not believe that the coal pipeline development is an issue that can be left to the States. Most of these pipelines will be interestate in nature. Mr. Moore has already told about what has happened in Virginia. I watched those efforts with interest. The railroad lobbying effort was intense and succeeded in eliminating all proposed legislation except the token study bill.

In summary, I do not know whether all small companies will benefit directly from pipelines, but I sincerely believe that many small and large companies and certainly consumers will, and I believe that it is in the national interest to give coal pipelines a reasonable chance to develop.

Therefore, I encourage you to enact S. 267 early in this legislative session. It is the right thing to do, and I would like to emphasize it is the right thing to do. There is no doubt about it in my mind. I am aware of the political difficulty of dealing with this issue, but I cannot help but wonder where our country would be if we had rejected progressive new modes of transportation in the past. Where would we be today if we had allowed the wagon and carriage manufacturers to inhibit development of the motor vehicle or the canal owners to obstruct the railroads?

And I digress there for just a moment. When I prepared these comments, they were in the process of being duplicated last Thursday when I learned of something that one of the previous panels alluded to, and if you haven't heard it, it is almost comical. It has been verified in the archives of the Library of Congress, and if you will bear with me a minute I am going to read a memorandum or letter from Martin Van Buren, Governor of New York.

The CHAIRMAN. Is that attached to your testimony?

Mr. CHRISTIAN. Yes, sir.

The CHAIRMAN. We will place it in the record rather than taking the time to read it.

Mr. CHRISTIAN. All right, Mr. Chairman. I also have received a statement in support of S. 267 from the National Coal Association president, Carl E. Bagge, and I respectfully request that my comments, the Martin Van Buren memorandum, and Mr. Bagge's statement be incorporated into the record.

The CHAIRMAN. Without objection, it is so ordered.

Mr. CHRISTIAN. Thank you for the opportunity to appear, and I welcome any questions, and I would like to comment very briefly——

The CHAIRMAN. Your time has expired. We have a vote on the floor, and we are going to run out of time.

Mr. CHRISTIAN. I want to speak in favor of Mr. Moore's suggestion. I think it would be a good idea.

[The prepared statements of Mr. Christian and Mr. Bagge follow:]

PREPARED STATEMENT OF C. LYNCH CHRISTIAN, JR., PRESIDENT, IMPERIAL COLLIERY CO., MILBURN COLLIERY CO., AND IMPERIAL COAL SALES CO., LYNCHBURG, VA.

Mr. Chairman and Members of the Committee, I am pleased to appear before you today in support of S.267, the Coal Distribution and Utilization Act of 1983. My name is C. Lynch Christian, Jr. I am a life-long resident of Lynchburg, Virginia, and am President of Imperial Colliery Company, Milburn Colliery Company and Imperial Coal Sales Company. Our three small coal companies are headquartered in Lynchburg, but our coal properties and mining operations are located in West Virginia.

Let me briefly describe our position in the coal industry. Our two producing companies date from 1901 and 1957 and our sales company from 1913. Last year, we produced and sold only about 300,000 tons from our West Virginia properties with the coal being marketed principally to industrial concerns in North Carolina, Virginia and West Virginia. Neither our producing properties, nor an additional 17,000 acres of reserves, are immediately accessible to water transportation. Accordingly, we are dependent upon truck and rail transportation from the mine site and are now finding it necessary to move some of our coal by truck over distances as great as 150 miles in order to be competitive.

Mr. Chairman, I cannot say with certainty that the coal my companies produce now, and intend to produce in the future, will be moved by coal pipeline. In fact, it has been argued that small producers will suffer rather than benefit from coal pipelines. In my view, however, the problems should not be any greater than those we experience today in obtaining access to railroad transportation. Furthermore, I am convinced that small operators have a far greater opportunity to access coal pipelines than they have for taking advantage of unit train rail rates.

Frankly, I expect criticism from my railroad friends for appearing here on behalf of this legislation, but I have a strong interest in seeing the addition of another efficient alternative to our present long-haul coal transportation system to which small producers such as Imperial and Milburn can have access.

I am here to urge you to act expeditiously in reporting S.267. The reason is simple: our country badly needs (1) greater competition in coal transportation, and (2) a new and progressive mode for coal delivery -- and we need it now.

The coal industry in our country is in a state of depression. Among our domestic fuels, coal has great advantages. Our supply is vast and secure as well as stable in price as mined and prepared for shipment. However, increasing railroad rates are undermining coal's cost advantage by significantly raising the delivered price of coal, making it more and more difficult to market our coal both domestically and internationally.

The attached chart will give you some idea of the relative changes that have occurred in recent years. It shows each percentage change in the rail rate and our coal selling price to an actual customer since December 1975. The effect of competition in the coal sector and its relative absence in the transportation sector is obvious.

The enactment of S.267, Mr. Chairman, will encourage companies in the private sector to develop coal pipelines that will compete effectively with railroads for coal transportation. The very fact of enactment of this legislation will immediately generate a degree of competition in coal haulage rates that is generally nonexistent today.

With eminent domain, coal pipelines undoubtedly will be constructed. Obviously, they can only complement or supplement, not replace, railroads or water carriers. Most importantly, I do expect them to provide much needed competition in this era of deregulation, thereby benefitting all ultimate consumers of coal and our industry's competitive position in international coal trade.

Finally, I do not believe that coal pipeline development is an issue that can be left to the states. Most of these pipelines will be interstate in nature. I watched with interest the efforts of the Virginia legislature to responsibly address the question of coal pipeline eminent domain legislation in its recent session and talked to my legislator friends about the issue. The railroads' lobbying effort was intense, and succeeded in eliminating all proposed legislation except for a token study bill.

In summary, I do not know whether our small companies will benefit directly from pipelines, but I sincerely believe that many small and large companies and certainly consumers will, and I believe that it is in the national interest to give coal pipelines a reasonable chance to develop. Therefore, I encourage you to enact S.267 early in this legislative session -- it is the right thing to do. I am aware of the political difficulty of dealing with this issue, but I cannot help but wonder where our country would be if we had rejected progressive new modes of transportation in the past. Where would we be today if we had allowed the wagon and carriage manufacturers to inhibit development of the motor vehicle -- or the canal owners to obstruct the railroads? America's growth and its world leadership have been based on development, acceptance and promotion of a constant stream of improved and more productive technologies. Let's not stop now!

Mr. Chairman, I have received a statement in support of S.267 from National Coal Association President Carl E. Bagge. I respectfully request that my comments and Mr. Bagge's statement be incorporated into the hearing record.

Thank you, Mr. Chairman, and Members of the Committee.

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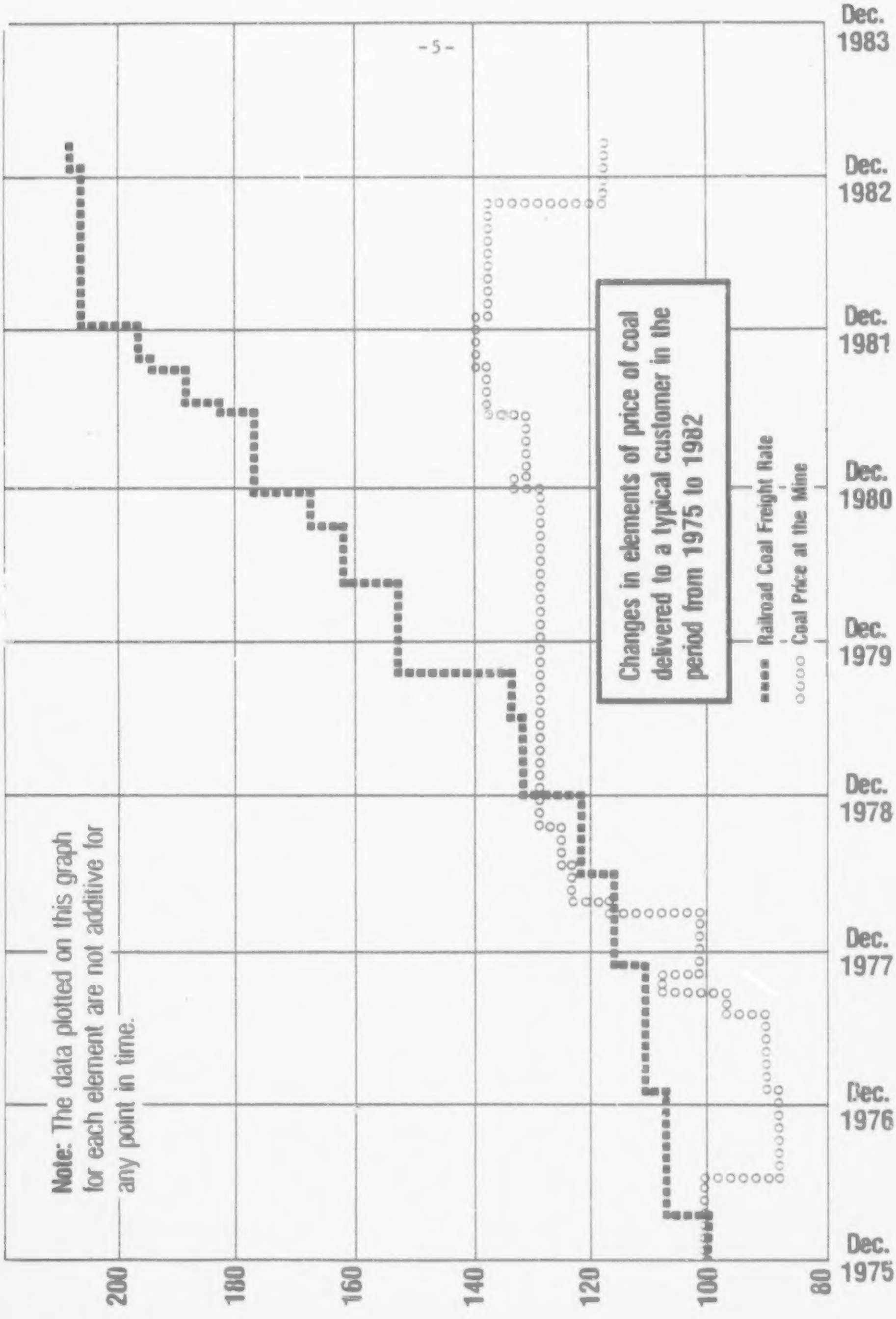
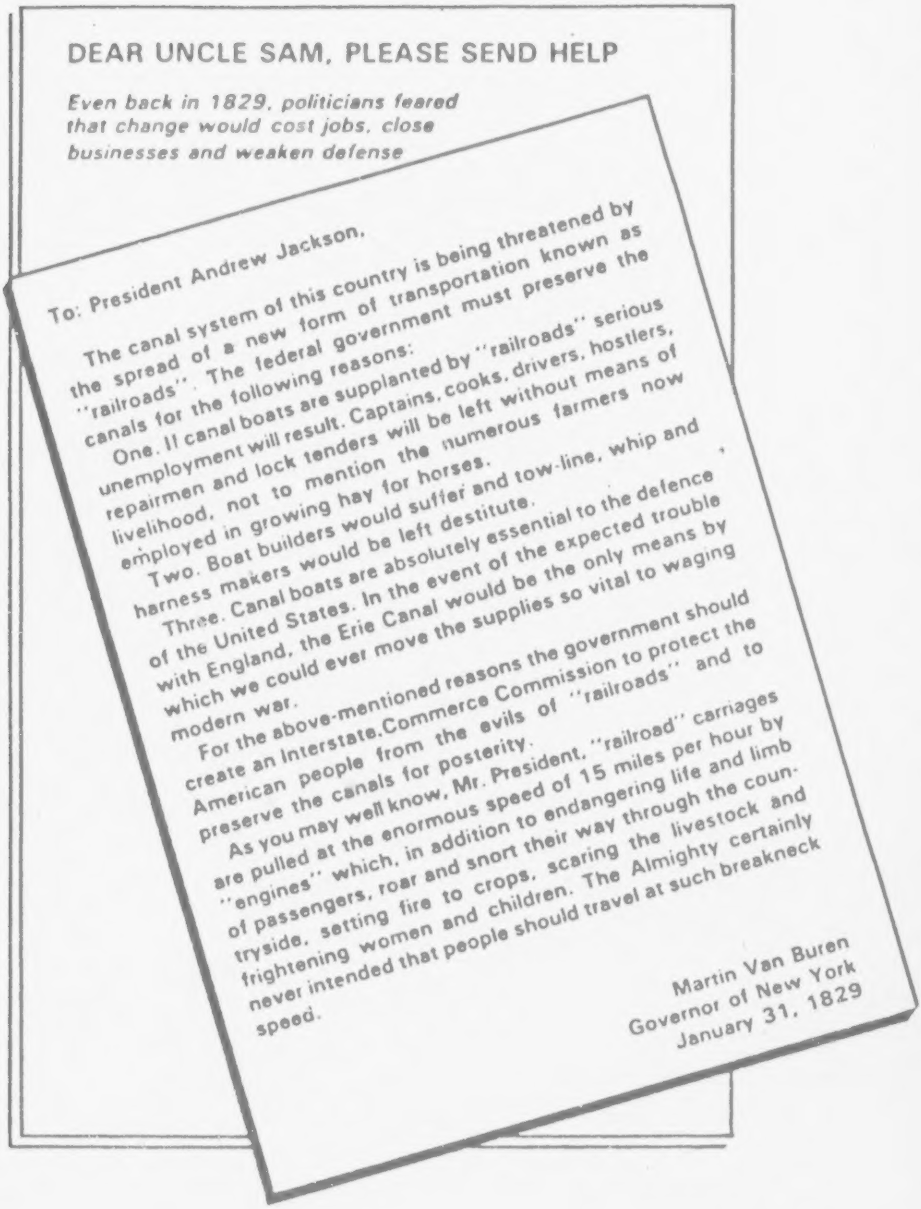
Attachment: Chart on Page 5.



Changes in elements of price of coal delivered to a typical customer in the period from 1975 to 1982

Note: The data plotted on this graph for each element are not additive for any point in time.

CHANGES IN INDEXES (Dec. 1975=100) FOR COAL PRICE AT THE MINE AND RAILROAD COAL FREIGHT RATE FOR SHIPMENTS OF COAL TO A TYPICAL CUSTOMER



DEAR UNCLE SAM, PLEASE SEND HELP

Even back in 1829, politicians feared that change would cost jobs, close businesses and weaken defense

To: President Andrew Jackson,

The canal system of this country is being threatened by the spread of a new form of transportation known as "railroads". The federal government must preserve the canals for the following reasons:

One. If canal boats are supplanted by "railroads" serious unemployment will result. Captains, cooks, drivers, hostlers, repairmen and lock tenders will be left without means of livelihood, not to mention the numerous farmers now employed in growing hay for horses.

Two. Boat builders would suffer and tow-line, whip and harness makers would be left destitute.

Three. Canal boats are absolutely essential to the defence of the United States. In the event of the expected trouble with England, the Erie Canal would be the only means by which we could ever move the supplies so vital to waging modern war.

For the above-mentioned reasons the government should create an Interstate.Commerce Commission to protect the American people from the evils of "railroads" and to preserve the canals for posterity.

As you may well know, Mr. President, "railroad" carriages are pulled at the enormous speed of 15 miles per hour by "engines" which, in addition to endangering life and limb of passengers, roar and snort their way through the countryside, setting fire to crops, scaring the livestock and frightening women and children. The Almighty certainly never intended that people should travel at such breakneck speed.

Martin Van Buren
Governor of New York
January 31, 1829

PREPARED STATEMENT OF CARL E. BAGGE, PRESIDENT, NATIONAL COAL ASSOCIATION

The National Coal Association commends the Committee for conducting hearings on S.267, the Coal Distribution and Utilization Act of 1983. NCA supports granting eminent domain to facilitate construction of coal pipelines. Coal pipelines are needed as part of the mix of effective long-haul transportation systems for the movement of coal from mines to electric utility and industrial plants and to ports engaged in exporting America's coal.

Coal production in 1982 totaled 820 million tons. About 65 percent of total production, 530 million tons, was carried by the railroads. Annual coal production by 1990 is forecast by NCA to reach 1.2 billion tons, and by 1995, to 1.5 billion tons. If the railroads' share of coal traffic continues at the 65 percent level, by 1990 the railroads would carry 780 million tons annually, an increase of 47 percent, and by 1995 the railroads would carry 975 million tons annually, an increase of 84 percent, compared with 1982 in both instances. On the other hand, coal pipelines are expected to move about 200 million tons annually by the mid-1990s, so that they simply would lower the railroads' share of increased coal traffic from 84 percent to 50 percent more than present levels.

Where they are available, inland waterways [illegible]nish efficient coal transportation, but railroads no[illegible]st be relied upon to carry a high share of our coal to various markets and trans-shipment facilities; and the railroads hold extensive market dominance over coal transportation. The competition which can be provided effectively by coal pipelines is essential to keep transport rates reasonable.

Coal is carried by barge at a rate of about 0.7 to 1.0 cent per ton-mile; by pipeline at about 1.5 to 2.0 cents per ton-mile; by railroad at about 2.5 to 4.0 cents per ton-mile, and by truck at about 10.0 cents or more per ton-mile. These variations, taken individually and in combinations, illustrate the magnitude of differences in costs for coal transportation as determined by mode of transport. Railroad freight rates for coal traffic have increased sharply in the previous four years. From November 1978 to November 1982, railroad rates on bituminous coal freight increased 58 percent.

Two recent actions of the Interstate Commerce Commission (ICC) with regard to railroad regulation underscore the importance of having coal pipeline competition with the railroads for the movement of coal. On February 24, 1983, the ICC served a decision in Ex Parte No. 347 (Sub-No. 1), coal rate guidelines, in which the Commission proposes to allow railroad coal rates to increase 15 percent per year above inflation, a situation which easily could cause existing rates to double in four to five years. Then, on March 3, the ICC announced its decision to exempt from regulation railroad movements of export coal. under Ex Parte No. 346 (Sub-No. 7). Obviously, this poses a serious threat by allowing unconstrained pricing and discrimination in coal shipments destined for export.

Given this threat, coupled with difficulty encountered in obtaining balanced regulatory decisionsit is considered vital to provide to the maximum possible degree, competition with the railroads furnished by coal pipelines. Such competition would be facilitated by S.267.

Therefore, we support S.267 now under consideration by the Committee. The bill would grant eminent domain required to assemble necessary rights-of-way for construction of coal pipelines. Without eminent domain, coal pipelines will remain stymied by the railroads, and critical competition for coal traffic again will be blocked, causing serious losses in full utilization of coal, our nation's abundant, inexpensive, and secure energy resource. We urge the Committee to report S.267 favorably without delay.

In summary, the National Coal Association, recognizing that rates charged for coal transportation services are a major component of coal's delivered price, supports granting eminent domain to enable construction of coal pipelines. Transportation competition furnished by coal pipelines will enable market forces to hold down transport rates, ensuring that America's coal is utilized fully in domestic markets for energy and in the world coal market. NCA's position in support of eminent domain for coal pipelines is held with the realization that:

- Railroad Rates for Coal Traffic are Increasing Sharply: During the period November 1978 to November 1982, on the average railroad coal freight rates have increased 58%. Clearly, railroad rates for coal traffic are rising sharply, a matter which holds serious implications with regard to the delivered price of coal, a factor having direct impact on the ability of America's coal to capture a full share of the energy market in the United States and the world coal market.

- Railroads Have Market Dominance over Coal Transportation: NCA studies show that 85% of railroad coal traffic has no effective and practical alternative to railroad transportation. Last year, coal accounted for 31% of railroad carloadings, nearly four times the next highest freight category, grain and other farm products. Obviously, coal traffic is highly vulnerable to the imposition of unreasonably high railroad freight rates due to the large amount of coal carried by the railroads, most of which is captive to the railroads.

- Coal Pipeline Competition with the Railroads Is Necessary; Government Regulation is Ineffective -- But Market Competition Works: The Interstate Commerce Commission and the railroads, in recent regulatory proceedings dealing with railroad market dominance and coal rate guidelines, have moved to erode captive shipper protection provided by the Interstate Commerce Act. Coal shippers having no effective and practical alternative to railroad transportation face the likelihood of serious abuses in rates and services. It is imperative, therefore, that coal pipelines be allowed to compete with the railroads for coal transportation so that market forces keep transport rates reasonable for the services provided, instead of reliance on regulation.

- Competition in Coal Transportation Reduces Consumer Prices of Electricity: For six years, a 108-mile pipeline carried coal to generate electricity in the Cleveland area. Competition provided by the pipeline led to a reduction of 46% in the rail rate. Consumers of electricity in Cleveland benefitted through lower rates due to lower coal transportation costs.

- Railroad Revenues and Employment Will Remain High Even When Coal Pipelines are Built: In the 1990's even when planned coal pipelines are in operation, increased utilization of coal will place greater demand on the railroads for coal transportation. Railroads will be called upon to move about one and one-half times the amount of coal traffic carried today, causing railroad revenues and employment to grow significantly, notwithstanding the existence of coal pipelines.

- Coal Pipelines Create More Jobs: Coal pipelines are projected to create 500,000 private sector jobs including 50,000 in the construction industry and 100,000 manufacturing jobs, in addition to jobs directly associated with coal pipeline operation and maintenance.

- Coal Pipelines Will Encourage More Exports of America's Coal: Competitive, efficient and reliable coal transportation services furnished by coal pipelines will encourage greater exports of America's coal by holding down coal freight rates. The Soviet Union, China, and other countries are investigating coal pipelines to move their coal into an increasingly competitive world coal market.

- Eminent Domain for Construction of Coal Pipelines Will Be Selective: H.R. 1010 and S.267 require individual coal pipelines to be certified in the public interest to be granted the use of eminent domain. Included in the certification process are stringent requirements making the use of water for coal pipelines clearly a decision left in the hands of the states, not the federal government.

- Contracting for Shipping Guaranteed Volumes of Coal Traffic for Long Periods Is a Common Practice: The lawfulness of contracting for railroad transportation services has been clouded until passage of the Staggers Rail Act two years ago. The Act, for the first time in almost a century of regulation, explicitly allows railroads to furnish both conventional tariff service and new contract service.

  More than 150 contracts for railroad coal transportation already are in force, spanning varied durations, of under five years, five years to 30 years, and in one instance, 39 years. The majority of these multi-year railroad coal transportation contracts include annual volume requirements. This is no different than guarantees which will be incorporated into coal pipeline contracts, a consideration which both refutes any notion that such guarantees are objectionable and underscores the fact that, given eminent domain, coal pipeline transportation can compete effectively on the same footing with railroad coal transportation.

The **Chairman**. Thank you.

Our next witness is Mr. Radin.

STATEMENT OF ALEX RADIN, EXECUTIVE DIRECTOR, AMERICAN PUBLIC POWER ASSOCIATION AND VICE PRESIDENT, CONSUMER FEDERATION OF AMERICA, WASHINGTON, D.C.

Mr. **Radin**. I am appearing here today in two capacities, first, as the executive director of the American Public Power Association. That represents about 1,750 municipally owned and other local publicly owned electric utilities throughout the United States, and second, as vice president of the Consumer Federation of America, which is the Nation's largest consumer advocacy organization with more than 200 national, State, and local groups, representing some 330 million consumers.

The American Public Power Association has been active in the Consumer Federation of America since the very beginning because we represent consumer owned utilities, so our organization, the American Public Power Association, and the Consumer Federation of America, have both adopted resolutions in favor of coal slurry pipeline legislation such as is being considered here today.

I will be very brief, Mr. Chairman. I think the principal reason that we are in favor of this legislation is because it is a means of competition in providing a source of transportation for coal.

As electric utilities, we find that our sales are frequently in a position of being wholesale purchasers, and we have found that invariably we get a much better deal in being able to buy wholesale power if we have more than one source of supply, and I think that analogy carries over into the purchase of coal also.

Let me just give you one example and then I will finish about the importance of this legislation, and that is the example of San Antonio which has been referred to earlier here, and that is the utility, publicly owned utility owned by the city of San Antonio which decided in 1973 to convert to coal in order to reduce dependency upon natural gas, which of course has been a national objective.

At that time, the Burlington Northern Railroad quoted a price of $7.90 a ton for delivery of coal from Wyoming to San Antonio. In October 1976, the rail rate was increased to $10.93 a ton. The rate was then increased to $17.12 a ton in 1978, to $18.18 a ton in 1979, and currently has been allowed to escalate to $26.42 a ton. Since 1973, the cost of coal transportation for San Antonio has increased 300 percent, largely because the utility had no feasible alternative to rail transportation for its coal delivery. This amounts to about $75 million a year just for coal transportation.

The irony of this situation is that during the time the rail rates increased, the coal rates remained relatively stable. In 1976 in San Antonio the cost of coal was $7.50 a ton, and during the first quarter of 1982 it was about $7.90 a ton. Currently it is $8.10 a ton.

There are many other examples of public power systems and other consumer owned systems which have to pay considerably more for transporting coal by rail than they pay for coal itself, and I think that really, summing up, the reason why we are in favor of this legislation, we feel that it is urgently needed in order to provide some real competition in the movement of coal to serve utilities, both investor owned and publicly owned and cooperatively owned.

Mr. Chairman, thank you.

[The prepared statement of Mr. Radin follows:]

PREPARED STATEMENT OF ALEX RADIN, EXECUTIVE DIRECTOR, AMERICAN PUBLIC POWER ASSOCIATION AND VICE PRESIDENT, CONSUMER FEDERATION OF AMERICA, WASHINGTON, D.C.

My name is Alex Radin. I am Executive Director of the American Public Power Association, and Vice President of the Consumer Federation of America, and Chairman of its Energy and Natural Resources Committee. I am presenting this statement in support of coal pipeline legislation on behalf of both organizations.

The Consumer Federation of America (CFA) is the nation's largest consumer advocacy organization with more than 200 national, state, and local groups representing some 30 million consumers. The American Public Power Association (APPA) is the national service organization representing more than 1,750 local publicly owned electric systems throughout the country. Because all of these utilities are consumer owned, APPA has taken an active role in CFA since its inception.

The bill before this committee, S. 267, "The Coal Pipeline Act of 1983," would allow coal pipeline operators to obtain rights-of-way across private lands through the use of federal eminent domain powers.

This legislation is long overdue and should be acted on as quickly as possible. It is important to electric utilities and to consumers because 52 percent of the nation's electricity is generated from the use of coal. The price of coal -- including its transportation -- will be of increasing concern in the future as utilities rely to a larger extent on use of coal.

Consumer Benefits from Coal Pipelines

Both CFA and APPA support S. 267 because it will provide competition to railroads in transporting coal, and, consequently, rail tariffs for hauling coal may be lowered or at least stabilized.

Utilities badly need competitive coal transportation such as pipelines because 85 percent of the coal transportation market is controlled by the railroads, which can prevent pipelines from crossing their lands. Because of their near-monopoly hold on the coal transportation system and their ability to use the hauling of utilities' coal to subsidize other customers, railroads have raised their tariffs to utilities by large margins in recent years, especially since the deregulation of railroads in 1980. Thus, coal transportation amounts to about half of the total cost of coal delivered to utilities.

The Interstate Commerce Commission's recent proposed rulemaking giving railroads authority to raise coal hauling rates 15 percent a year above the rate of inflation and to charge captive shippers more in order to lower rates where there is competition for the service is a sharp reminder of monopoly power and is another reason for supplying competition through coal pipelines.

Rail tariffs are significant factors affecting consumers' utility bills. Because public power systems are nonprofit, operating on a cost-of-service basis, the price of delivered coal must be passed on to consumers. On the other hand, should the cost of transportation drop, that decrease is also passed on to consumers.

A dramatic example of a public power system captive to rail transportation is provided by the experience of the San Antonio (Texas) City Public Service Board. This city-owned electric utility decided to convert to coal in 1973 in order to reduce its dependence on natural gas and oil. At that time, the Burlington Northern Railroad quoted a price of $7.90 a ton for delivery of coal from Wyoming to San Antonio. In October of 1976, the rail rate was increased to $10.93 a ton. The rate was then increased to $16.12 a ton in 1978, to $18.18 a ton in 1979, and currently under the Staggers Rail Act, which virtually deregulated rail rates, it has been allowed to escalate to $26.42 a ton.

Since 1973, the cost of coal transportation for San Antonio has increased 300 percent, largely because the utility had no feasible alternative to rail transportation for its coal delivery. This amounts to about $75 million a year just for coal transportation.

The irony of this situation is that during the time the rail rate increased, the coal rate remained relatively stable. In 1976, San Antonio's cost of coal was $7.50 a ton; during the first quarter of 1982, it was about $7.90 a ton. Currently, it is $8.10 a ton.

There are other examples of public power systems which have to pay considerably more for transporting coal by rail than they pay for coal itself. The municipal electric utility in Hibbing, Minnesota, pays $11.17 per ton for coal, plus $23.30 per ton for rail transportation, making the total price per ton $34.47. Another example in Minnesota is the Virginia Department of Public Utilities, which pays $11.42 per ton for coal plus $23.36 for freight. In addition, the utility pays between $7,500 to $8,800 a month for the use of freight cars. Not only is the price of coal tripled because of these freight transportation costs, but, in addition, utilities lose control over the ultimate cost of using coal if they are captive shippers of a railroad.

Although coal pipelines will not serve all areas of the country, the threat of competition and the comparison of transportation costs will benefit areas not directly served by coal pipelines.

The high cost of energy is of particular concern to the Consumer Federation of America. In an introduction to its Energy and Natural Resources Resolutions approved January 22, 1983, CFA noted: "In recent years, the price of energy has been rising faster than the cost of living, and has been a principal contributor to inflation." At its annual meeting on January 22, 1983, CFA also reaffirmed its support of coal pipeline legislation. CFA's resolution supports "federal legislation which would provide the right of eminent domain to builders of coal slurry pipelines, while recognizing legitimate states' rights in protecting their water resources."

The American Public Power Association also has adopted a resolution supporting coal slurry legislation. At its annual meeting on June 14, 1977, the APPA membership approved a resolution which "endorses the construction of coal slurry pipelines to share with railroads the burden of transporting vastly increased coal supplies, and urges the Congress to enact legislation authorizing slurry pipelines to exercise the power of eminent domain, but providing also that no pipeline should be built without consideration of the balance between the energy needs of the area to be served and the water needs of the producing area."

Savings to consumers due to delivery of coal by pipelines would vary according to the specifics of the pipeline. A study of the Coalstream Pipeline, which runs from Illinois and West Virginia to coal plants in Georgia and Florida, has estimated the line could save consumers $12 billion in transportation costs over a 20-year period.

Another significant consumer advantage to this legislation is that construction of seven pipelines could result in about 500,000 jobs in construction and manufacturing with no expenditure of federal money, according to methodology used by the Bureau of Labor Statistics.

Other consumer benefits of coal pipelines may include:

- Increased use of a domestic resource, coal, thereby alleviating the country's dependence on foreign oil;
- Increased potential for coal exports, which would benefit the nation's balance of payments; and
- A coal transportation system which is not as susceptible to inflationary pressures as are railroads.

Environmental advantages to consumers include replacement of unit trains with quiet, efficient, and safe underground pipes. If coal pipelines use the federal power of eminent domain, the requirements of the National Environmental Policy Act and the Federal Water Pollution Control Act must be met. Furthermore, this legislation does not ask for tax dollars to subsidize or develop coal pipelines.

Necessity of Federal Legislation

The coal pipeline bill before this committee, S. 267, provides that before a coal pipeline operator can exercise the right of federal eminent domain, the operator must apply to the Secretary of Energy who has to certify that the pipeline would be in the national interest. If the pipeline is determined to be in the national interest, the operator can exercise the power of eminent domain in the U.S. District Court for the district in which the lands are located or in the appropriate state court. Procedures for eminent domain established under existing law provide for the deposit of money equal to the fair market value of the land with the court.

Despite the documented advantages, the Administration has opposed federal eminent domain legislation for coal pipelines. Its reasoning is based on the premise that use of eminent domain should be left to the states. It is interesting to note that before the President opposed the bill, the Secretaries of the Departments of Energy, Transportation, and Commerce, and the Council on Environmental Quality supported federal eminent domain for coal pipelines as both appropriate and necessary.

In his November 16, 1981, memorandum to Interior Secretary Watt, the President noted that "Coal slurry pipelines may be an efficient and cost-justified way to move coal and they should be allowed to compete on their own merits as contributors to improving America's energy situation." The President also said, "It is clearly contrary to the national interest for private parties such as railroads, or for individual states, to thwart projects beneficial to the nation simply for their own parochial purposes."

Unfortunately, without the power of federal eminent domain, it is clear that the national interest will be thwarted because few coal pipelines can be built. A few states do provide eminent domain for coal pipelines, but a number of state laws deny application where the pipeline crosses the state without picking up or dropping off coal within the state. In addition, a state-by-state approach would mean long delays because of the inconsistencies between state laws, and because of the length of time it would take state legislatures to act.

At a recent Senate Energy Committee hearing, Secretary Watt indicated that the Administration is reassessing its position on coal slurry. Since the bill is a good example of the Administration's theory of encouraging the private sector to create jobs, it would be a logical consequence for the Administration to change its position on the issue and to support federal eminent domain for coal pipelines.

There is ample precedent for granting federal eminent domain authority to coal pipelines. Such authority has been granted to railroads, oil and gas pipelines, and some electric transmission lines on the theory that such power is in the public interest. Coal pipelines are equally in the public interest, and many cannot be built unless granted the power of federal eminent domain.

Currently, there are nine coal pipelines in advanced planning stages ranging in size from one 200 miles long from Utah to Nevada, which could deliver 10 million tons of coal a year, to one 1,500 miles long from Appalachia to Georgia, which could deliver up to 55 million tons of coal a year. If all these proposed pipelines were completed by the end of the 1980's, they could deliver approximately 150 to 170 million tons of coal a year.

Savings Projected from Use of Coal Pipelines

Since coal pipeline legislation was first introduced 21 years ago, there have been numerous studies comparing the cost of coal pipelines with other methods of transporting coal. For example, a study conducted in May, 1981, by A.T. Kearney, Incorporated, for the Coalstream Pipeline Company, a subsidiary of Continental Resources Company, compared rail and pipeline rates for transporting coal from Illinois and West Virginia to 16 generating plants in Georgia and Florida for the years 1988 (the proposed first year of operation of the pipeline involved) through 2007. Based on an inflation rate of 9.8 percent, the study concluded that the pipeline delivering 54 million tons of coal a year over a 20-year period would save $12 billion in transportation costs in 1981 dollars ($54 billion in inflated dollars).

A February, 1981, study by National Economic Research Associates on the same coal pipeline from Illinois and West Virginia to Georgia and Florida estimated a savings in our national oil import bill of $678 million in 1995 and $723 million in 2000 by virtue of the substitution of coal for imported oil. In addition, increased coal production that would be facilitated because of the pipeline would provide employment for 5,200 additional mine workers in Kentucky, West Virginia, Indiana, and Illinois.

There are not only savings because of competition, but also savings because the cost of building and operating pipelines is less than railroad transportation of coal. A staff study by the Joint Economic Committee in 1980 stated that the cost of building and operating a pipeline is about half that of building and operating rail lines. About 70 percent of the coal pipelines' costs are related to capital investments which are fixed. Only the remaining 30 percent related to labor, electric power, and supplies are variable, and thus subject to inflation. In contrast, only 30 percent of railroads' costs are fixed; the rest are variable. For this reason, operating costs of pipelines are relatively stable over long periods.

Coal Pipelines Are Efficient

The efficiency and economy of a pipeline depends on the type of terrain that has to be crossed, the length of the line, and the amount of coal transported. The National Energy Transportation Study, published in 1980 jointly by the Department of Energy and the Department of Transportation, said, "Under appropriate conditions, coal slurry pipelines can be the economical and environmentally preferable means of transporting coal. Coal slurry pipelines may be an economic form of transportation where large volumes of coal need to be transported over a long distance from one mine area to a single user and where a direct rail or barge route does not already exist."

A more recent study made last year by Ebasco Services, Incorporated, reports that coal pipelines are more economical than coal transportation by railroad, rail/barge, and transmitting electrical energy by power lines. The study, published in Ebasco's Energy Business magazine, reviews the comparative costs for moving blocks of energy in units of 1,600, 3,200, 6,400, and 9,000 MW increments over distances of 500, 900, and 1,500 miles. The study concluded:

- Coal pipelines provide the lowest cost mode of energy transportation analyzed, followed by rail/barge.
- Coal pipelines and transmission lines are more inflation-proof than rail or rail/barge modes of transportation because of the low overall operating and maintenance costs associated with coal pipelines and power transmission lines.
- If coal pipelines are to be viable, the right of eminent domain must be available to the user.
- Consideration should be given to advanced pipeline concepts, including coal/oil slurry transport and methacoal slurry transport.

Water Rights Not Affected

Some serious concerns have been raised about the use of scarce western water for coal pipelines. I believe the bill before this committee adequately protects water rights with very specific safeguards.

Last year during Senate Energy Committee markup, Senator Wallop offered amendments to protect state water law which were accepted. The same language is included in S. 267. The Wallop amendments assure that any water used by interstate coal pipelines must be acquired in compliance with state water law and prohibit the use of the Act's eminent domain authority to acquire water or the right to water. The Wallop amendments specifically provide that the states may enforce terms and conditions on the use of water in interstate coal pipelines -- even after the water moves in interstate commerce. The Wallop amendments further assure the primacy of state water law by requiring that applicants for federal eminent domain authority must first obtain state authorization for the water to be used in the proposed pipeline.

Concern also has been expressed about the amount of water used for coal pipelines. At the point of origin, coal pipelines use significantly less water than mine-mouth electric generating plants or synthetic fuel plants built in the same area. For example, a powerplant burning the same amount of coal consumes seven times as much water for cooling as a pipeline would use to transport the coal hundreds of miles to more efficiently located plants. Coal pipelines transporting one million tons of coal use about half the water needed for a one-million ton coal gasification facility. Also, coal slurry lines can use water which is not suitable for agricultural or municipal use, or is too contaminated or saline for some purposes.

A January, 1980, report by the General Accounting Office entitled "Water Supply Should Not Be An Obstacle to Meeting Energy Development Goals" found that "...local water consumption would be reduced substantially if coal slurry lines or alternate modes of transportation replaced local electricity generation....If some of the opposition could be satisfied that slurry pipeline problems are minimal, there would be substantial interest in developing additional lines and a possibility of reducing water consumption in water-short areas."

In addition to the fact that coal pipelines use less water than other energy-related facilities built in the same area of origin, there are current studies underway with the objective of reducing water use further by using other liquids such as liquid carbon dioxide, oil, methanol, and waste water.

As to the quality of discharged water, any water discharged by coal pipelines must first meet stringent federal standards under the Clean Water Act. In many cases, the powerplant will use the slurried water in cooling. Since the amount of water needed for cooling is seven times the amount used to carry the coal through the pipeline, some of the water will be evaporated. The experience of the ETSI pipeline in Arkansas has demonstrated the federal, state, and local discharge requirements were easily met.

Environmental Issues

Some concern also has been expressed about the disruption to the land by building a coal pipeline. I do not believe this is a significant problem. Pipelines are buried deep in the ground, below the frost line. Farmers can work the land above them. Certainly, coal pipelines are less disruptive than unit trains rumbling through towns several times a day, causing noise, air pollution, and other environmental effects. Furthermore, a coal pipeline that uses the eminent domain authority in the pending legislation or that crosses federal land will be subject to the National Environmental Policy Act, which includes among other requirements the preparation of an environmental impact statement.

As to the environmehtal effect of leaks or ruptures in the coal pipeline, there is currently advanced, state-of-the-art technology which provides careful attention to maintenance, allows quick detection of a rupture, and automatic cut-off valves. In addition, coal slurry is less explosive than pipelines carrying oil, gas, or chemicals, and thus offers less of an environmental threat.

Increased Coal Use

Another issue of concern to consumers is whether there is a sufficient transportation market for both railroads and slurry lines. It is undisputed that domestic coal use is increasing and will continue to increase. Coal production is estimated to reach 1.5 billion tons by 1995. In contrast, 820 million tons of coal were produced in 1982. In addition to increased domestic use of coal, there is a growing foreign market for American coal.

Coal exports rose about 20 percent in 1980 from 64.8 million tons in 1979 to about 73 million tons in 1980. The National Coal Association has estimated that exports could increase to 118 million tons by 1990. Thus, by 1995, railroads could more than double the amount of coal they are currently transporting. Even if all the coal pipelines were in operation by 1995, which is unlikely, pipelines could carry only 25 percent of the projected increases in coal, and less than 10 percent of the total amount of coal produced.

The projected increases in coal use have also been estimated to create more than 40,000 new railroad jobs.

Increases in foreign use of U.S. coal depend upon its being priced competitively with other energy sources. Transportation costs amount to a significant portion of the delivered price of coal. If these costs can be lowered because of coal slurry pipeline transportation, coal will obviously be more attractive to foreign markets. "The World Coal Study," published in 1980 by the Massachusetts Institute of Technology, said the United States has the greatest potential for meeting the world's increased coal needs because of large coal resources and high-level technology. Addressing ways to lower coal transportation costs, the report noted: "Although the use of coarse slurries merely as a technique for rapid loading and discharging at the ports has been proposed, a more significant development would be the loading and movement of slurries transported by pipeline from inland mines to the ports."

Conclusion

It is important to consumers and to public power systems that coal pipeline legislation be enacted as quickly as possible. Utilities badly need the competition offered by coal pipelines because about 85 percent of coal transportation is controlled by railroads. Because of their near-monopoly on transporting coal and their ability to use the hauling of utilities' coal to subsidize other customers, railroads have exorbitantly raised their tariffs to utilities. Thus, coal transportation amounts to about half of the total cost of coal delivered to utilities.

Public power systems are nonprofit, operating on a cost-of-service basis, and therefore the price of delivered coal has to be passed on to the consumers. On the other hand, should the cost of transportation drop, that decrease is also passed on to the consumer.

It is important to note that all segments of the electric utility industry -- investor owned companies, public power systems, and rural electric cooperatives -- support coal pipeline legislation.

Other benefits of coal pipelines to consumers include: (1) the potential for creating 500,000 jobs; (2) facilitating increased use of domestic coal; (3) increased potential for coal exports; (4) use of less water than synthetic fuels; and (5) substitution of quiet, efficient, and safe underground pipes for additional unit trains.

In light of the above, the Consumer Federation of America and the American Public Power Association urge this committee to act promptly in reporting the much needed coal pipeline bill.

The CHAIRMAN. Thank you very much.
Mr. Georgine.

STATEMENT OF ROBERT A. GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, WASHINGTON D.C.

Mr. GEORGINE. Actually I can sum up my remarks, Mr. Chairman, in just a couple of minutes. I am Bob Georgine, and I do represent the Building and Trade Department of the AFL-CIO. I think that much of what I have in my testimony and much of what I was going to say was more eloquently said by Senator Johnston just a few minutes ago in that last panel, but the building and construction trades department is interested in the development and construction of a coal slurry system so that we can put our people back to work, and according to the Slurry Transport Association, construction and operation of the 7 major pipeline systems currently proposed will require about 150,000 new workers, and that is a lot of carpenters, electricians, and pipefitters.

This is at a time when there is nothing we need more than jobs. There is nothing this country needs more than jobs, and if you use the Bureau of Labor Statistics' methodology, over 500,000 indirect jobs will be created, so basically what we are really saying, Mr. Chairman, is that if this country would concentrate its energies on becoming the leading world producer of coal, more jobs would be created for everybody—the coal mine, the railroads, the maritime industry and everybody involved, so I could just basically say that we are in favor of this because we think it is good for the country, and we need the jobs badly.

[The prepared statement of Mr. Georgine follows:]

PREPARED STATEMENT OF ROBERT A. GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, WASHINGTON, D.C.

Mr. Chairman, members of the Energy and Natural Resources Committee, I am Robert Georgine, President of the Building and Construction Trades Department, AFL-CIO, representing 4.3 million building tradesmen.

On behalf of the Building Trades Department, I appreciate this opportunity to express our views in support of S. 267, a bill introduced to facilitate the transportation of coal by pipeline. The Coal Distribution and Utilization Act of 1983 represents a vital step toward the establishment of a coal slurry system.

The merits of the coal slurry pipeline system have been long debated. We believe, however, that the advantages of using such a system far outweigh claims of negative impact. There are very definite benefits in the development and use of the slurry pipeline system, of interest not only to building trades workers, but to the country as a whole: benefits such as jobs, cheaper and more reliable energy, and a successful export product.

Slurry pipelines will spur increased extraction and utilization of this country's greatest energy resource, coal of which the United States has enough to meet coal energy needs for several hundred years. Development of this U.S. energy resource can have a positive economic effect in many related industries, from mining to machine manufacturing, and help revive our economy.

How can coal slurry pipelines increase coal use? Quite simply, by providing some competition to the now dominant railroads, coal pipelines will make U.S. coal more enticing and more economical to utilities and foreign users. The railroads are now substantially deregulated, and without some competition they are driving potential coal customers away--foreign customers are turning to South African, Polish, and perhaps soon to Chinese coal, and U.S. utilities are buying coal from Europe and South America.

The Building and Construction Trades Department is, of course, interested, in the development and construction of the coal slurry system so that we can put our people to work. According to the Slurry Transport Association, construction and operation of the seven major pipeline systems currently proposed will require about 150,000 new workers: jobs for carpenters, masons, electricians, ironworkers, operating engineers, pipefitters, and manufacturing jobs to make needed equipment for construction and operation of the pipelines. And using Bureau of Labor Statistics methodology over 500,000 indirect jobs could be created with a $12 billion investment. These jobs are very important to our members. The members of our affiliated unions throughout the country are carefully trained and highly skilled, having worked on the full range of energy technology and development projects. They are prepared to put their skills to work.

The International Energy Agency, just last year, called on world governments to commit to increased coal use, and to develop technologies, including coal slurry pipelines, to make coal cheaper, cleaner, and efficient to use. This country has the workers, the brain power, and the technology to become the world leader in coal production and export, as well as in the research and refinment of better and better ways to use coal.

One technology the U.S. already has, an efficient transportation system for getting coal to the people who will use it is coal slurry pipelines. As the world increases its coal use, more workers will be needed to mine and move that coal. Enact this legislation and let those workers be Americans.

If the U.S. would concentrate its energies on becoming the leading world coal producer, more jobs will go to railroad workers, too. According to the Association of American Railroad statistics, railroad employment in Class I railroads has declined by 107,288 since 1970, even though no coal slurry pipelines were built during this period. If the railroads would allow a little competition for their coal business, simply having a choice would entice more utilities, industrial users, and foreign users to stop using foreign fuels and switch to U.S. coal. The pie would get bigger, and railroad workers, coal miners, and pipeline workers would benefit. As a case in point, if an expected 310 million more tons of coal moved through the U.S. in 1995, 40,000 more railroad workers will be needed even with a coal pipeline system.

Technological innovation has always been this country's strength and the catalyst for American prosperity. Scientists are researching new, efficient, clean uses for coal by developing and testing new technologies which are compatible with coal slurry pipelines. For example, the Department of Energy, the Electric Power Research Institute, Atlantic Research Corporation, and other companies are currently spending millions of dollars researching and testing a new technology of burning a coal-water mixture directly in boilers presently designed to burn oil.

The fuel has a low-ash content and would be about one-fourth the cost of oil for equivalent heating value. Companies are also researching the feasibility of transporting eastern coal through a coal pipeline to a single point mooring system for vessel loading for shipment to Western Europe. Since coal slurry pipelines transport a coal-water mixture, construction of coal pipelines can significantly encourage further research into, and indeed the commercial viability of these new technologies. This will lead to new jobs and to the development of innovations which can be sold and shared with other countries.

Thus it is obvious that the projected 150,000 new jobs which construction of the seven major planned pipelines would require is an understatement if one takes into account the workers which will be needed to develop technologies now being researched for increasing coal's versatility and marketability. But this burst in technological innovation, jobs, and energy security depend upon competition for the transportation of coal and the assurance of reasonable rates which competition facilitates.

S. 267 takes nothing away from railroads except the privilege of having a monopoly and subverting this country's goal of increased coal use. The U.S. has an energy source that will last for upward of 500 years, that can give us energy security, that we can develop with our own workers and transport with our own skills to light and heat homes and produce goods in our factories. Pipelines are invisible, noiseless and safe. This legislation is pro-consumer, anti-monopoly, anti-pollution and pro-free market. I urge you to give careful consideration to S. 267, and the many benefits which construction of coal pipelines will bring.

The CHAIRMAN. Thank you very much. Do you want to ask questions?

Senator JOHNSTON. Let me just ask one question if I may, Mr. Chairman. Mr. Moore, as one of your questions of VEPCO, you say you saved $60 million. How many customers do you have?

Mr. MOORE. $1.2 million.

Senator JOHNSTON. It would be almost $60 per household?

Mr. MOORE. It would be about a 5-percent reduction.

Senator JOHNSTON. A 5-percent reduction in our already exorbitant rate? [Laughter.]

Mr. MOORE. In your already very low rate, bargain-basement rate, that's right.

Senator JOHNSTON. I wish Senator Warner was here to hear this.

The CHAIRMAN. Senator Ford.

Senator FORD. Mr. Christian, you were kind enough to bring a letter of the past. It reminded me of Abraham Lincoln. I read Lincoln. He was born in Kentucky, you know, and left to go North. He said I believe in his defense of the railroads against the bargelines across the Missouri River, when the jury returned a favorable verdict for Mr. Lincoln, he said when progress is made, someone gets hurt, and what we have to decide here I think is are we really making progress? And second then, who do we hurt the least? And we find that this has a rippling effect. At least I do, as it relates to railroad pension plan, less payments into the plan; we find the rates coming down, lots of things here.

The environment has to be taken into consideration I might say to Mr. Moore that you referred to the Alaskan amendment—not a producing state, but what that would affect, if all the Kentucky coal would go that route and hit the Ohio River, it would affect us the same way, so I don't think there is a producing state that wouldn't be affected as it does in Alaska, but I find here Alaska gets treated different from anybody else.

The CHAIRMAN. Might I ask the members of the panel, would you be inconvenienced if we went to vote and came back and concluded the questioning in just a few minutes?

Mr. CHRISTIAN. That would be fine with me.

Senator FORD. I have finished my statement, Mr. Chairman. I have no further questions.

The CHAIRMAN. I don't want to cut anyone off who wants to ask questions, but I only have one, and that is we have two different tables attached to two different statements, making comparisons between the price of coal and the price of transportation on the railroads of that coal. Those tables are somewhat in variance.

The one that you are holding up, Mr. Christian, that is attached I think to your statement. That indicates the price of coal has come down from 1978 through 1982.

Mr. CHRISTIAN. It has.

Senator FORD. No question about that.

The CHAIRMAN. And the statement which is attached to Mr. Dempsey's statement, the table, indicates that the price of coal has continued to escalate during all that period of time. He attributes the information there, he doesn't make any—yes?

Mr. CHRISTIAN. Mr. Chairman, this is an actual customer experience of mine.

The **Chairman**. It says the average price of coal FOB mine mouth; source, DOE.

Mr. **Christian**. I represent this to be a, it is typical and it is an actual customer.

The **Chairman**. If as a matter of fact this table that Mr. Dempsey attaches shows the price going up, do you think DOE is wrong or he has incorrectly reported what DOE has said?

Mr. **Christian**. I can't challenge his statement because I don't know the source, but it is conceivable that on balance, that coal in some cases has gone up, but I know this is what has happened.

Senator **Ford**. I might say here that the so-called low-sulfur coal to meet environmental standards may have increased some in price to get a certain type of coal, but coal across the spectrum is down, and you can get spot prices today at mine mouth. I guarantee it has gone down, and I think the Wyoming case where it has gone up just very little to San Antonio——

The **Chairman**. I think with that, gentlemen, there is no need to ask you to wait. I do appreciate your testimony and your willingness to wait until this late in the day to give it. I'm sorry when we somewhat cut you off at the end.

Mr. **Christian**. You understood this was an actual customer and a typical case?

The **Chairman**. Yes, sir, I do. Thank you very much. The record will remain open in the event that members wish to make questions in writing.

The committee is adjourned.

[Whereupon, at 4:55 p.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

JAMES ABDNOR
SOUTH DAKOTA

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VERNON
ADMINISTRATIVE ASSISTANT

COMMITTEES:
APPROPRIATIONS
ENVIRONMENT AND PUBLIC WORKS
JOINT ECONOMIC

United States Senate
WASHINGTON, D.C. 20510

SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
RECEIVED
MAR 18 1983
WASHINGTON, D.C. 20510

March 15, 1983

Official Committee File
Gary
MAR 18 1983

Honorable James McClure
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Chairman McClure:

In view of the imminent markup of S. 267, the Coal Distribution and Utilization Act, in the Committee on Energy and Natural Resources, I would like to call to your attention the enclosed statement which I am submitting for the record of Monday's hearing.

As you may know, the State of Missouri has joined with the railroads in litigation aimed at blocking South Dakota's allocation of water to the ETSI pipeline. Please note the astounding water use statistics contained on Page 2 of my statement, and I think you'll agree the plaintiff's case has no merit.

In fact, the plaintiffs acknowledge that ETSI will harm no valid, existing water right; but they justify their case on the "precedent" which will be set and upon presumed, future massive diversions which they contend will threaten their rights.

In that regard it seems to me that the committee's markup of S. 267 affords a golden opportunity to say no to obstructionism, and to say yes to the protection of valid States' rights from any infringement resulting from exercise of the new Federal authority contained in the bill.

It's time to call the obstructionists' bluff.

I urge the committee to adopt language along the lines of the amendment I've suggested.

With best personal regards,

Sincerely,

Jim Abdnor
JAMES ABDNOR
United States Senator

JA/oar

Enclosure
cc: Energy and Natural Resources Committee members

Chairman McClure and members of the committee, does it seem fair or logical that a State which does not even control the use of water by its own citizens should have standing to attempt to block in court a water allocation duly made by another State which does limit withdrawals within its borders? Obviously not, but that is exactly what the State of Missouri is attempting to do in Missouri v. Andrews.

The measure before you, S. 267, is concerned with removing obstructions which are inconsistent with the public interest; and in that context might I suggest the committee consider removing the standing of any State which does not control the use of water within its own borders to obstruct in court a water allocation granted to a coal pipeline by another State.

How can a State argue on one hand that national interests require that no water be allocated to coal slurry, but on the other that there is no need to control the use of water within that same State's borders for any other purpose? It cannot be argued on any basis of equity -- only on the basis of greed, pure political arrogance, and bureaucratic obstructionism.

Lest the committee be misled that the plaintiff States may have the smallest of justifications for their suit, please consider the following facts:

--Missouri currently uses 116 times as much water for industrial purposes as South Dakota uses (Missouri -- 5800 MGD v. South Dakota -- 50 MGD).

--South Dakota, which has approved sufficient water from Lake Oahe for 2 pipelines, would have to allocate water to 322 pipelines to use as much water for industrial purposes as Missouri already uses!

--Iowa uses 76 times as much water for industrial purposes as South Dakota uses (Iowa -- 3800 MGD vs. South Dakota -- 50 MGD).

--Nebraska uses 46 times as much water for industrial purposes as South Dakota does (Nebraska --2300 MDG v. South Dakota -- 50 MDG), and Nebraska uses over 20 times as much for irrigation (Nebraska -- 9300 MDG vs. South Dakota -- 460 MDG).

--In order to use as much water in total as Nebraska is currently using, South Dakota would have to allocate water to about 621 coal pipelines the size of ETSI's! (Nebraska -- 11,600 MGD v. South Dakota -- 510 MDG)

--Nebraska has supported the High Plains Study, which contemplates the diversion into Nebraska of up to 4 million acre-feet of water from Fort Randall Dam in South Dakota to compensate for the fact Nebraska irrigators are mining their ground water. The ETSI pipeline will use 1/2 of 1 percent (.005) of the amount of water Nebraska hopes to take from South Dakota!

ETSI -- Water Usage v. Availability

--The average annual flow of the Missouri River at Sioux City, Iowa, is one thousand seventy (1070) times as much as the ETSI pipeline will use! (Missouri River flow -- 21,400,000 acre-feet v. ETSI -- 20,000 acre feet)

--The six huge Missouri River mainstem reservoirs can store three thousand seven hundred twenty (3720) times as much as ETSI will use! (Storage capacity -- 74,400,000 acre-feet v. ETSI -- 20,000 acre-feet)

--Evaporation on Lake Oahe alone is forty (40) times as great as ETSI will use. (evaporation -- 800,000 acre-feet v. ETSI -- 20,000 acre-feet)

--Evaporation on all six mainstem reservoirs is seventy-five to one hundred (75-100) times as much as ETSI will use. (evaporation -- 1,500,000-2,000,000 acre-feet v. ETSI -- 20,000 acre-feet)

--ETSI will use 1/60th of the quantity of water which has been identified as surplus to other needs and available for energy usage. ("Water for Energy," U.S. Bureau of Reclamation, 1977)

Good Guys v. Bad Guys?

Normally, the good guys are the ones who drag the bad guys into court for redress. It is notable that the plaintiff States left South Dakota out of their suit, but efforts have been made to cast South Dakota as the "bad guy" for having allocated water to ETSI. Claims that South Dakota is "raiding the Missouri River" are exploded by the water usage statistics presented above; but opponents have charged that South Dakota intends to become the "Saudi Arabia of water"; that is, to profit unconscionably from the marketing of water for industrial purposes. Nothing could be further from the truth. Consider these facts:

--In 1980 South Dakota ranked 48th in per capita income, while the plantiff states -- Missouri, Nebraska, and Iowa -- all ranked much higher; i.e. 32nd, 28th, and 24th, respectively.

--South Dakota is a very poor state. Iowa's per capita income is over $1300 more each year than South Dakota's. Nebraska citizens earn over $1100 more each year than South Dakotans do, and Missourians earn nearly $1000 more each year than South Dakotans do.

--Two of the ETSI beneficiary states, Arkansas and Mississippi, rank 50th and 51st, respectively, in per capita income.

--The average of the per capita incomes of the plaintiff states -- Missouri, Nebraska, and Iowa -- is over $1000 more than the average of the per capita incomes of South Dakota, Louisiana, Arkansas, Mississippi, and Oklahoma, states which will benefit from ETSI ($7046 v. $5990).

--ETSI's agreement with South Dakota provides for the payment of $9 million per year to the State. That's less than $14.00 per capita. (South Dakota population -- approx. 670,000)

--Iowa, Nebraska, and Missouri demanded, received, and are the prime beneficiaries of flood control provided at the cost of over one million (1,185,744) acres permanently inundated under storage reservoirs in the Dakotas.

--Iowa, Nebraska, and Missouri are the prime beneficiaries of stabilized navigation flows which are possible only because of the great sacrifice of the Dakotas.

--Nebraska receives more of the hydropower generated at the Dakota dams than either of the Dakotas do, and in eight years out of ten, Iowa has received more of the power as well.

--To compensate for the loss of so much land for the benefit of downstream states, the Dakotas were promised large-scale irrigation development -- development which has not been provided and which actually has been fought by congressmen from Iowa and Nebraska, the very states which have benefitted from the sacrifice of the Dakotas.

If there are "bad guys" in the Missouri Basin, they are definitely not in the Dakotas! South Dakota's Governor Janklow has expressed incredulity at the greed of the downstream states for the wealth (i.e. land, water, and hydropower) of the Dakotas, and the facts bear him out.

The Law & Fairness v. Missouri, Nebraska & Iowa

The plaintiff states allege (incorrectly, as the water usage statistics show) that the ETSI diversion will impede navigation flows. Even if they were correct, however, the Flood Control Act of 1944, which authorized the huge Dakota dams, contains the following language, known as the O'Mahoney-Milliken Amendment:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes. (Flood Control Act of 1944, Section 1(b), emphasis added)

This provision of law was part of the legislative compromise through which the Dakotas sacrificed over a million acres of their best river bottom lands to be permanently inundated to provide protection from periodic flooding in the more populous downstream states, the very same States which are in effect trying to deny South Dakota the use of the waters which it has stored at great cost to itself. The O'Mahoney-Milliken Amendment made explicit that the upstream States have an absolute right to use as much of their own water as they need, and that the use of stored Missouri River flood waters to maintain navigation flows in downsteam states, "shall be only such use as does not conflict with any beneficial consumptive use" in the upstream states. Yet in spite of the equities involved and the explicit, statutory provisions to the contrary, the downstream States are attempting to deny the upstream States the use of their own water. Through the O'Mahoney-Milliken Amendment, Congress endeavored to achieve a measure of fairness for the upstream States and to preclude the downstream States from doing what they are now trying to do.

Mr. Chairman, in an effort to find a face-saving way for the lower Missouri basin States to stop being obstructionist, I have had correspondence with the Justice Department regarding a possible amendment to the bill. The amendment and the reply from Assistant Attorney General Dinkins focus on last year's version of the bill, S. 1844; but I understand the current measure, S. 267, is identical.

Ms. Dinkins points out that the draft amendment would promote States' rights and has suggested several ways in which the language could be further strengthened. The text of the letter follows:

Land and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 19, 1982

Honorable James Abdnor
United States Senate
Dirksen Senate Office Building
Room 4327
Washington, D.C. 20510

Dear Senator Abdnor:

This is in response to your letter of September 20, 1982, soliciting the Department of Justice's views on a possible amendment to S.1844, the Coal Distribution and Utilization Act of 1982. According to your letter, the primary objective of this amendment is to enhance the bill's protection of States' rights, in particular, State water rights, without causing any adverse unintended consequences. With these considerations in mind, we have carefully reviewed the language of your staff's draft amendment and offer several comments. In making these comments, however, we must stress that nothing in this letter should in any manner be construed as a departure from this Administration's previously-announced opposition to enactment of S.1844.

As presently drafted, Section 4 of S.1844 requires the Secretary of Energy to make certain findings prior to making a determination that a proposed interstate coal pipeline distribution system is in the national interest. These findings include the extent to which the system could affect the environment as compared to alternative transportation systems, examples of which are enumerated in the bill. The draft amendment proposes to include as a specific example of an alternative system, the use of other water sources. We perceive no legal impediments to this proposal. To the contrary, requiring consideration of the utilization of other water sources appears to be a logical extension of the examples now explicitly enumerated in S.1844.

Second, your staff's amendment proposes to add to Section 4 of S.1844 a subsection (b)(2) which would provide that in addition to the findings required by the Secretary described in the previous paragraph:

> if a State other than the State which
> has approved and provided a water per-
> mit or other appropriate authorization
> for a coal pipeline distribution system

> under section 5 objects in writing to the Secretary pursuant to subsection (c) that the approved system would adversely impact any valid, existing water right of such State and the Secretary finds that such an adverse impact will occur, the system shall not be approved. No coal pipeline system shall be considered to have an adverse impact upon any existing water right of any State if such system will divert less than one percent of the lowest annual flow ever recorded in any river at the point at which such river exits from the State in which such diversion will occur.

Although this provision presents no constitutional problems, certain aspects may limit its ability to promote your intended purpose of protecting States' rights.

To be sure, new subsection (b)(2) would promote States' rights to the extent that it provides States other than the State of origin of the pipeline system with a veto over the project, but this veto power is limited in several significant aspects. First, each State's consideration of adverse effects on water rights is limited to those impacts on "valid existing water rights of the States." Consequently, if the State wished to protect internal waters of the State which heretofore had not been appropriated or the use of which, although not codified as a formal water right, was to protect the environment by maintaining instream values, this subsection would provide no authority to do so. Indeed, by explicitly limiting consideration to such certain water rights, the amendment would create, by negative implication, a strong presumption that Congress did not believe that other effects should carry any weight. Moreover, this portion of the amendment contains a significant ambiguity. It refers only to "water rights of such State" and thus it is not clear whether consideration of adverse effects is limited to water rights held by the State itself as opposed to all water rights issued by the State.

The proposed subsection also limits a State's veto power by providing that the Secretary of Energy must determine that the adverse effect "will" occur. Most often, potential adverse effects will not be absolutely certain but only more or less probable. By requiring a determination by the Secretary, therefore, that the effect will in fact occur, the power of a State to veto a project could end up being limited. Notably, we offer this comment not to suggest that requiring an independent determination by the Secretary is not the wisest course, but only to point out the ramifications of the provision on your intended objective of States' rights.

Perhaps the most significant of the limitations included in subsection (b)(2) of the amendment is its provision that a diversion of less than one percent of the lowest annual flow of the river at the point it exits the State will not be considered an adverse impact. Whether or not there is merit to this limitation, there is no question that it imposes a congressional determination concerning water allocation on the States by dictating which effects can be deemed significant. It is not at all certain that all States would agree that a diversion of such a size is inconsequential. This might be the case, for example, if the diversion came from a river with the largest volume of any river in the State. There are also likely to be significant factual disputes over how such a measurement should be made by the Secretary.

Third, your staff's amendment proposes to substitute the word "may" for "would" in subsection (b)(3) which allows affected States to comment to the Secretary on the merits of a proposed coal pipeline distribution system. This amendment presents no legal problems. Its adoption would simply underscore congressional intent that all States which might be affected by a system and not just those in which the system would be allocated should have an opportunity to comment.

Finally, in your letter you asked if we would keep you apprised of our response to the request from Senators Gorton and Baucus for draft legislative language eliminating any ambiguity in S.1844. As you know, in my testimony I responded to both Senators' inquiries by telling both Senators we had not yet attempted to determine how best to eliminate ambiguity in S.1844 but that if they made a formal request in writing, we would respond to it. We did not receive a formal inquiry from either Senator until October 13 and, therefore, have just begun to address the issue.

I hope that this letter is responsive to your inquiry.

Sincerely,

Carol E. Dinkins
Assistant Attorney General
Land and Natural Resources
Division

In response to Ms. Dinkins' suggestions we have reworked the draft amendment, and I urge the committee to consider lanaguage along the following lines as a substitute for that presently contained in subsection 4(b):

(b) Findings.--(1) In making a determination under subsection (a) with respect to any proposed interstate coal pipeline distribution system, the Secretary shall make findings concerning the extent to which the system--

(A) would help meet national needs for coal distribution and utilization considering coal;

(B) would enhance competition and provide new market outlets and opportunities for coal producers, including small and independent producers;

(C) would contribute to the national security by encouraging the displacement of imported petroleum, petroleum products, and coal with domestic coal;

(D) would result in economic benefits including --
(i) reductions in coal transportation costs;
(ii) reductions in wholesale and retail electric rates; and
(iii) enhanced reliability of supplies of both coal and electric energy; and

(E) would affect the environment, compared to the environmental impacts of alternatives, including --
(i) railroad transportation;
(ii) alternate pipeline routes;
(iii) coal utilization facilities, including electric generating plants at coal mine sites and coal gasification plants; and
(iv) use of other water sources.

(2) In addition to the findings in paragraph (1), if a State other than the State which has approved and provided a water permit or other appropriate authorization for a coal pipeline distribution system under section 5 objects in writing to the Secretary pursuant to subsection (c) that the proposed system would adversely impact any valid, existing water permit or other appropriate authorization for reservation, appropriation, use or diversion of water under applicable law of such State and the Secretary finds that such adverse impact may occur, the system shall not be approve For the purposes of this subsection only, no coal pipeline system shall be considered by the Secretary to have an adverse impact if such system will divert less than one percent of the lowest annual flow ever recorded in any river at the point at which such river exits from the State in which such diversion will occur and notwithstanding any other provision of law no court shall find any adverse impact upon any State from any such coal pipeline syst for which appropriate Federal permits have been granted prior to enactment of this Act.

(c) State consultation. -- Prior to making the findings in subsection (b) regarding a proposed interstate coal pipeline distribution system, the Secretary shall provide an opportunity for written comment from any State in which a proposed interstate coal pipeline distribution system would be located or which may otherwise be affected by a proposed interstate coal pipeline distribution system.

Again, Mr. Chairman, there is no merit in the litigation brought by the lower Missouri basin States; but I would be more than pleased to have Congress give them a face-saving way out of their currently untenable position. The amendment I've suggested will do so. It will preclude further obstructionism, but at the same time it will prevent the Federal Government from rushing in when valid questions pertaining to State water rights remain to be answered.

I submit, Mr. Chairman, that it is possible to separate the wheat from the chaff when it comes to State water rights claims; that it is in the national interest to do so; that language along the lines I've suggested will contribute toward that end; and, furthermore, that is what everyone who has addressed this issue says they believe should be done.

Let's get on with it.

SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

HEARING

MARCH 14, 1983

TESTIMONY ON S. 267

(COAL SLURRY EMINENT DOMAIN)

SUBMITTED BY:

THE HONORABLE TERRY E. BRANSTAD

GOVERNOR, STATE OF IOWA

As Governor of the State of Iowa, please know that I strongly oppose granting the federal power of eminent domain to coal slurry pipelines as provided in S. 267 and H.R. 1010.

My opposition revolves around three major issues:

1. Water Allocation. There are many unresolved issues in regard to water use and diversion. Presently, there are not sufficient mechanisms to determine the interests of all affected states. Coal pipelines require a tremendous amount of water and would have regional impacts on other water users. Effects on arid regions and downstream states have not been determined. Granting federal eminent domain power to coal pipelines without first addressing all water allocation issues would by default certify water allocation for coal pipelines. Water allocation issues must be decided first, before considering federal eminent domain power for coal pipelines.

2. Economic Impact. Granting federal eminent domain power to coal pipelines could have a detrimental effect on the nation's already ailing railroads. Consumer prices could increase due to high pipeline construction costs and an altered transportation cost structure for coal and other commodities. The impact on employment and energy consumption is uncertain. The economic impact of granting federal eminent domain power to coal pipelines needs to be thoroughly analyzed. Consideration of the full range of costs and benefits does not appear to favor coal pipeline technology.

3. State vs. Federal Control. These bills would restrict states' control over their land. The federal power of eminent domain should not be granted except in cases of overriding national necessity. The present situation is not one of those cases. The rail system has the capacity to transport all coal shipments. Land and water use should be governed by existing state and federal laws, and interstate compacts. If states determine that pipelines are in their best interests, they can facilitate their construction through state condemnation powers. Two coal pipelines have already been built without federal eminent domain power.

Iowans are greatly interested in the eventual outcome of the coal slurry pipeline bills, and we hope that our concerns and reservations will be adequately addressed in future legislative discussions.

STATEMENT OF
AMERICAN TRUCKING ASSOCIATIONS, INC.
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

U.S. SENATE
IN SUPPORT OF
COAL SLURRY PIPELINES

March 18, 1983

- -

The American Trucking Associations, Inc. (ATA) -- the national organization representing the motor carrier industry, including for-hire and private, intercity and urban trucking companies -- supports coal slurry pipelines and their right to eminent domain to cross federal and private lands and railroad right-of-way.

The ATA policy is based upon the belief that increased utilization of the Nation's vast resources of coal is needed if we are to reduce our dependence upon imported oil. ATA believes that future demand for coal for electrical generation and industrial boiler use and the development of synthetic fuel production using coal as a feedstock will provide the markets for increased coal production.

Yet, as the Nation's premier freight mover, the American trucking industry knows that transportation provides the essential link between production and demand. If the transportation link is weak, then the entire coal energy chain will be weak. Unfortunately, the coal energy chain is weak because of an over-dependence on one mode.

Coal slurry pipelines (CSPs) provide an alternative method to the railroads for moving coal long distances. Transporting coal by pipeline offers the same economic and other advantages that pipelines transport affords for oil and gas. One can expect that construction of long distance pipelines of economical, reliable and continuous transport of coal will contribute to the demand for coal, just as earlier pipelines did for oil and gas demand.

Not only are CSPs a means to stimulate increased domestic and foreign use of America's coal, but also they will reduce transportation's demand for petroleum-based fuel. CSPs are powered by electricity which can be generated by the very coal they transport, while all other modes -- barge, rail, truck -- require diesel fuel. For example, the only currently operating CSP is Black Mesa, operated by the Southern Pacific Company which owns Southern Pacific Railroad between Northeast Arizona and Southern Nevada, which moves over 1.3 billion ton-miles annually. Had the same amount of coal been moved by rail, over 4.4 million gallons of diesel would have been used.[1/] Nine proposed pipelines[2/] will transport over 103.2 billion ton-miles annually. The railroads would need over 344 million gallons of diesel to transport the same ton-miles. Three hundred forty-four million gallons of diesel would heat almost 290,000 homes[3/] or all the homes in Louisville, Kentucky or Rochester, New York.

Unfortunately, development of CSPs has been delayed not because of technological or financial problems. Rather, development has been delayed because the now-dominant mode in coal transportation -- the railroads -- fear the competition that would result if CSPs were built. In the new world of "free market" solutions, the railroad's arguments are sorely out-of-date. Moreover, the railroads would deny to competition one of the basic rights they themselves enjoy: The right of eminent domain.

The railroads acknowledge they are fighting CSPs because they will "deprive" them of operating revenue and that it will "superimpose a redundant transportation system."[4/]

[1/] Based upon 300 ton-miles per gallon for a long-haul unit coal train.

[2/] Allen-Warner Valley, Pacific Bulk, NICES, San Marco, Texas Eastern, ETSI, Coalstream, VEPCO and Ohio.

[3/] Based on 1,200 gallons per home.

[4/] Statement by the Association of American Railroads' President William H. Dempsey, before Public Works and Transportation Committee, House of Representatives, Hearings on Coal Pipeline Carriers, November 8, 9, 22, 1979, p. 265-270.

Yet, all competition is based upon so-called "redundant" systems, whether those systems are Pepsi Cola versus Coca Cola; digital versus Accutron watches; or network versus public television. Railroads enjoy no special right which protects them from new technology. Yet, railroad spokesmen have been so bold as to say, "we have a right to protest government fostering a competitor."[5]

Ironically, based upon data from a recent Departments of Transportation and Energy study, even with CSPs, railroads will haul over one billion tons of coal in 2000, up 144 percent from 418 million carried in 1975.[6] Moreover, they will maintain the current market share of 63-65 percent. All existing and presently proposed CSPs will handle only 170 million tons -- slightly more than 11 percent of the total, approximately the same percentage hauled by trucks. In other words, not all coal traffic is open to competition and the railroads are destined to carry the lion's share.

Finally, railroad's demand for protection from competition ring particularly hollow given the regulatory reform of the Staggers Rail Act of 1980 which allowed them to raise rates more easily. With this Act, railroads can no longer justify their differential pricing, under which they try to maintain total revenues by charging higher rates for less competitive traffic, such as coal, and lower rates on traffic where there is effective competition from other modes such as motor carriers.[7/]

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[5] Statement by Daniel L. Long, "Pipeline Backers Orchestrate Push for Coal Slurry Proposals," Congressional Quarterly, March 13, 1982, p. 564.

[6] Congressional Research Service, "National Energy Transportation Study", Vol. III, Issues and Problems, March 1978.

To impede competition results in an indirect federal subsidy to the railroads which already enjoy a substantial tax advantage. For example, the 1981 Economic Recovery Act provided a change in accounting methods for the railroads which permitted them to start writing off about $8 billion in rail track, some of which had been carried on the books since 1887.[8/] Moreover, a recent study by the Joint Committee on Taxation found railroads paid among the lowest tax rates. Railroads received refunds or credits of $129 million while having an income of $1.7 billion, or a negative tax rate of 7.5 percent.[9/]

The overriding issue is whether the railroad industry will be allowed to continue preventing competition from coal pipelines which, in many cases, can provide a more reliable, environmentally safe, and more economical method of coal hauling. Continued delay in development of coal pipelines will inevitably weaken the total transportation link in the new coal energy chain. For example, without CSPs, increased railroad coal traffic will have significant social and environmental implications for those

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[7/] Statement by Frank N. Wilner, Director of Waterway Studies, Association of American Railroads, as reported in Traffic World, May 18, 1981, p. 42.

[8/] Wall Street Journal, October 27, 1981.

[9/] Washington Post, March 10, 1983.

living in areas near railroad tracks. Some coal trains can lose as much as 1% of its weight from droppage and dust blown during a thousand mile run. Already, some towns have 12 trains a day; by the year 2000, the figure could be up to 80.[10]

In conclusion, what is good for the Nation's railroads is not necessarily good for transportation. Moreover, what is good for the railroads may not be in the best interest of the Nation's energy policy. Competition in the energy distribution system is essential for a sound energy policy. Continued delay in the development of coal pipelines will inevitably weaken the transportation link in the new coal energy chain. Therefore, the ATA support coal slurry pipelines in their efforts to achieve eminent domain legislation which will help them to open up vast coal reserves and act to exert competitive discipline over rail coal rates.

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[10] John F. Davis, "Coal Transportation in the 1980's and 1990's," The Environmental Professional, Vol. 4, pp. 51-63, 1982.

The Coal Operator
P. O. Box 967
Beckley, WV 25801

Phone 304-255-2600

This paper is prepared to be submitted for the record to the Committee on Energy and Natural Resources. The subject is, of course, coal slurry pipelines.

My name is Robert L. McKeand. I am editor and publisher of The Coal Operator Magazine. My home is in Beckley, West Virginia.

When I first heard of coal slurry pipelines, I was philosophically a supporter of the concept. Reasons were basically centered around competition for the railroads. I decided to do an article on them for the magazine. To my surprise, I found many coal operators opposed to the pipelines and I found none who supported it. I then realized that I did not have immediate access to the heads of the larger coal companies or associations who were backing the pipelines.

These things made me start digging deeper into the pipeline controversy before taking a position on it. In short summary fashion, I believe the following to be the reasons most coal operators are opposed to the pipelines.

1. They have heard the promises but most feel that small operators will not be able to feed coal to the pipelines. The promised numerous inlets will be too expensive to build with mixing facilities, analysis and testing labs necessary to control coal quality of the outlet. Instead, they feel that a few large companies relatively close to the origin of the pipelines will be able to keep the pipelines filled. Economically, the pipeline companies will have to keep the number of contracts administered to a minimum number.

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2. They feel the experience of the Ohio pipeline will be repeated. The "unit" train soundly undercut an existing pipeline and made it go out of business. When asked about the western pipeline that is still in business, most of my responses indicated they felt that one survived only because the train route to compete with it was too long. These questions led me personally to dig a little deeper into the claimed economic advantages which I will mention shortly.

3. Most of the small coal operators feel that the use of water resources should be examined more than they have and I agree fully with them. Through all kinds of publicity (and I have been privileged to see some federal studies) most of us feel that water will soon, probably by the year 2000, become a critical resource shortage. I could find no research that really dealt with the problem of the use of the total quantity of water by the pipelines on rainfall, on efficient use at the outlet end or anything else about water use. I personally would suggest that the lack of technology about water may well become the equivalent of the lack of research on hazardous waste which has plagued the nuclear power industry. God knows that I never thought I would be on the same side of an argument as the Sierra Club but here I am. I have seen a study completed by the State of Colorado which includes a study of water. The conclusions are frightening. Rather than alarm people about the future, I will only suggest that every person who is to vote on the slurry pipelines should read that study before voting.

4. The next point I will make about the small coal operators' position is that they feel the advent of the slurry pipelines will help kill the remaining small independent coal mines. I have had many who compare the impact of pipelines to the coal mine Health and Safety Act. The statistics from that legislation bear out the demise of the small coal mine operation. I personally feel that legislation was necessary but it could have been implemented better.

5. My personal studies of the economics of coal slurry pipelines have convinced me that a lot of promises are being made which are impossible to keep. I have been unable to obtain any detailed cost of construction and cost of operation plan. At one time, just looking at the aggregate proposed pipelines, they totaled some 250 billion dollars. In most of the businesses I have seen, investors want their construction money back in 10 years. If you give this aggregate proposed the highest total tons of coal capability, it would total some 325-3[illegible] million tons of coal per year. Just the construction cost return added to operating cost without profit begins to look to me like the savings in transportation would be minimal, if existent at all.

6. The last point I will make about the small coal operators' position is that I believe one of the original threats they felt has been removed. That is, that slurry pipelines would be the vehicle by

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6. Continued

which western coal could take over the eastern coal market. This came from the fact that the early pipelines proposed were in the west. The advent of the proposed eastern pipelines has alleviated that fear.

In conclusion, I will present a few more points which I think pertinent to the coal slurry pipeline controversey.

One: If you look at the routes of all the proposed pipelines, they cover only a very small segment of the coal producing states. I really can't see them as a viable alternative to rail transportation of coal. Too many coal areas of our country will not be covered by pipeline.

Two: The railroads themselves are not without blame for this threat to them. The completely outlandish raise in coal transportation rates since the passage of the Staggers Act is beyond the realm of understanding. And, the ICC implementation of the Staggers Act has been completely disgraceful. I believe they avoided completely the spirit and intent of Congress. That is just more proof that our bureaucracy is out of control.

Three: Through my magazine, I try to say that our coal industry needs to reflect our total free enterprise system. We need big coal companies, we need small coal companies, we need to take ad-

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> vantage of coal all through our country. The big coal companies lead us through technological development. The small coal companies can efficiently mine coal in smaller reserves than can the big coal companies. We need western coal, we need eastern coal. We need all of them because coal will be the swing energy resource between oil and some renewable energy resource of the future.

Gentlemen: we do need a viable alternative to rail but, as you can see from these words, I do not believe the coal slurry pipeline is that viable alternative. I do want to congratulate the supporters of the pipeline. They have taken a very nebelous concept and made it sound attractive. I only ask for complete study before you cast your votes. Above all else, we need to make our coal competitive in price in both the domestic and foreign markets.

Thank you for the opportunity to testify on this very important issue.

Robert L. McKeand

Robert L. McKeand
Editor and Publisher
The Coal Operator Magazine
P.O. Box 967
Beckley, West Virginia 25801

The small magazine you find in big offices throughout the coal industry

UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

STATEMENT OF THE

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

1102 INTERSTATE COMMERCE COMMISSION BUILDING
TWELFTH STREET AND CONSTITUTION AVENUE, N.W.
POST OFFICE BOX 684, WASHINGTON, D.C. 20044
TELEPHONE (202) 628-7324

ON

S. 267, A BILL PROPOSING THE COAL DISTRIBUTION AND UTILIZATION ACT OF 1983

MARCH 25, 1983

Mr. Chairman and Distinguished Members of the Committee:

I. Introduction

My name is Larry J. Wallace, and I am Chairman of the Indiana Public Service Commission. I am presenting this statement to the Committee as President of the National Association of Regulatory Utility Commissioners, commonly referred to as the "NARUC". Accompanying me are Paul Rodgers, NARUC Administrative Director and General Counsel; Rita A. Barmann, NARUC Director of Congressional Relations; and Linda L. Kent, NARUC Assistant Director of Congressional Relations.

The NARUC is a quasi-governmental, nonprofit organization founded in 1889. Within our membership are the governmental agencies of the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands which are engaged in the regulation of utilities and carriers. Our chief objective is to serve the consumer interest by seeking to improve the quality and effectiveness of government regulation in the United States.

The Association appreciates this opportunity to express its views on S. 267, the proposed Coal Distribution and Utilization Act of 1983. This measure is of particular interest to the Association since our members include those State officials who are charged with the responsibility of regulating investor-owned electric utility companies within their respective jurisdictions.1/ Therefore, the NARUC is vitally concerned with the effect that coal slurry transportation will have on electric utility rates.

1/ Nebraska is the only State which does not regulate electric utilities, all of which are owned or regulated by public power districts and municipal governments within its borders.

II. The NARUC Position

At its Summer Meeting held in Seattle, Washington, July 28-29, 1982, the NARUC Executive Committee, the policy-making body of the Association, endorsed the concept of granting the Federal power of eminent domain to interstate coal pipeline systems in order to facilitate the national distribution and utilization of domestic coal. We firmly believe that increased competition in coal transportation, by reducing electric utility fuel costs, will benefit the ratepayers whose interests we must protect.

Currently, the majority of coal transported in this country is captive to the railroads with no competitive alternatives to hold transportation rates down. The cost of moving coal has increased dramatically, particularly since the deregulation of railroad rates under the Staggers Rail Act of 1980. Much of the impact of these increases has been borne by utility ratepayers.

The NARUC submits that the development of interstate coal pipelines will provide the necessary safeguards to encourage lower transportation costs by enhancing competition in the coal transportation market. These savings will result in lower utility rates and, ultimately, in beneficial savings to ratepayers.

The NARUC supports S. 267, and we urge swift Congressional approval of the bill in order to facilitate the development of coal slurry pipelines as an alternative to the transportation of coal by rail. We heartily endorse section 7 of the bill, which preserves the viability of State and local laws and regulations concerning the environmental and public safety aspects of interstate coal pipelines. However, we would suggest that any legislation enacted by Congress expressly provide State regulatory commissions with an oversight role in regard to the contractural arrangements between coal pipelines and electric utilities. Such an addition to S. 267 would maintain the advantages of competition without sacrificing ratepayer protections. The remainder of my testimony will detail our concerns and suggest a possible amendment to accommodate them within the context of S. 267.

III. Protection of Public Utility Ratepayers

As stated earlier, the primary objective of the NARUC is to protect the interests of consumers by improving the quality of government regulation. In order to accomplish that goal, the States must be given the opportunity to ensure that the rates for the transportation of coal charged by coal carriers will be in the public interest. Therefore, we respectfully urge the Committee to amend the bill to allow the appropriate State regulatory authority, upon request, to review and approve any contract between a pipeline carrier and a public utility prior to the effective date of the contract.[2] This amendment is similar to an amendment offered by the Association last year during the Committee's consideration of S. 1844. As in last year's proposal, this amendment will ensure that the States are allowed meaningful input into the determination of rates charged by pipeline distribution systems without imposing any undue burden on the development or operation of interstate pipelines.

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[2] This amendment may be made to S. 267 by:
(1) Adding a new section 10 containing the following language: "A contract entered into pursuant to this section between a coal pipeline carrier and a public utility shall, upon the request of the State regulatory agency exercising rate-making authority over said public utility, be submitted to the State regulatory agency for review and approval prior to such contract's becoming effective. The State regulatory agency shall have 60 days from the date on which the contract is submitted to take final action with respect to the contract."

The danger exists that electric utilities may become captive to coal pipeline carriers, as they are to certain rail transporters, when this legislation is approved. Coal pipeline carrier costs are anticipated to be substantially below those of the railroads. As a result, pipelines may be able to capture coal shippers by undercutting rail rates. In the case of public utilities, particularly electric utilities whose ratepayers are already severely overburdened by the high cost of energy, coal pipelines could capture the utility's business and still make undue profits at the expense of consumers.

The NARUC believes that the contract review it proposes would be the most effective route to guard against the threat posed to captive shippers and to afford meaningful ratepayer protections. State public utility commissions have a crucial stake in the implementation of an interstate coal pipeline system. Our amendment will allow the States to exercise their expertise in determining whether proffered contracts are fair to all interested parties.

As presently written, the bill does not permit any oversight of coal pipeline contracts on either the Federal or State levels. We at the NARUC have viewed with alarm the problems that have been created in the natural gas market through long-term contracts with onerous take-or-pay provisions, indefinite price escalators, and most-favored-nation clauses in producer/pipeline contracts. The Federal Energy Regulatory Commission (FERC) believes that it does not have the proper statutory authority to remedy problems resulting from such contract provisions, despite widespread agreement that those provisions severely harm gas consumers. To protect electricity consumers, we believe that S. 267 should contain some means for contract review to help protect utilities from troublesome long-term contract provisions.

State regulatory commissions will be involved in review of electric utility/coal carrier contractural arrangements to the extent that they impact upon the utility's cost of service, in order to ensure that all costs recovered from ratepayers are just and reasonable. However, stronger ratepayer protection could be accomplished if the States were afforded the opportunity to review utility/pipeline contracts before they take effect. Therefore, the NARUC respectfully requests that the Committee adopt this proposal.

The NARUC strongly endorses the provisions contained in section 8 of the bill which would ensure the continuing jurisdiction of State public utility commissions to exercise ratemaking authority over electric utilities. This section is important in that it will protect the ability of State commissions to explore all the pertinent issues in various rate proceedings and will assure those agencies the freedom to permit or deny passthrough of coal pipeline costs to consumers as they see fit. The section preserves State commission autonomy in utility rate hearings and we urge the Committee to include it in the final version of this measure.

IV. Public Safety

Recognizing that safe management of coal pipeline facilities, including the construction, operation and maintenance of the various components of the system, is of concern to both

State and Federal governments, the NARUC agrees with the intent of section 7 of the bill that all safety regulation should be left to the States for disposition in the exercise of their inherent safety authority.

Safety measures are more effective when developed and implemented by those officials who are in the best position to assess the unique requirements of a particular locality. The language contained in section 7 will preserve the continued application of essential safety requirements free of the often inflexible character of Federal regulation.

V. Conclusion

Of all the bills currently under consideration by the Congress, the NARUC prefers the approach taken by S. 267 to allow the right of Federal eminent domain authority for interstate coal pipeline distribution systems. This legislation contains many important provisions which we hope are included in the final version enacted into law.

We feel that the provisions of the bill contained in section 5, which includes the requirement that any water used by coal pipelines be acquired in compliance with State water laws, are especially praiseworthy. These issues are of particular importance to western States, and we agree that the States' authority over precious water resources must be preserved.

The NARUC also agrees with the intent of section 4(c) to permit the States to comment prior to the granting of eminent domain authority to the pipeline by the Secretary of Energy. The comment period will allow the States the opportunity to offer the benefit of their expertise on how the operation of a coal pipeline system will affect their residents.

However, in order to preserve an effective State role in the operation of coal pipeline systems without undue regulation, the NARUC requests that the Committee adopt the amendment explained above. State commission review of pipeline/utility contracts will ensure that the interests of consumers are protected.

Implementation of coal pipeline distribution systems will enhance competition in the transportation of coal, thus guaranteeing that the most economical rates are charged for coal haulage. The NARUC firmly believes that this will ultimately benefit ratepayers by holding down the delivered price of coal to electric generating facilities. We look forward to the expeditious and successful consideration of this important legislation.

Thank you for your attention.

Statement

of the

NATIONAL CATTLEMEN'S ASSOCIATION
PUBLIC LANDS COUNCIL
NATIONAL WOOL GROWERS ASSOCIATION

Before the

ENERGY & NATURAL RESOURCES COMMITTEE

U.S. SENATE

Regarding

S.267, Coal Slurry Pipelines

Presented by:

Ronald A. Michieli

Vice President, Natural Resources
National Cattlemen's Association

Executive Director
Public Lands Council

March 14, 1983

Mr. Chairman:

The National Cattlemen's Association, the Public Lands Council, and the National Wool Growers Association are opposed to legislation delegating federal powers of eminent domain to builders of coal slurry pipelines.

The bill before this committee provides private interests with the federal power of eminent domain so that these companies need not be discomforted by the wishes of the landowners and the states that their lines cross. The argument that this benevolence towards pipeline builders would be helpful to consumer is fallacious; in the end, it would increase consumer costs.

Eminent Domain

This legislation expropriates the rights of the states to grant eminent domain for the construction of slurry pipelines. As such, it is a direct attack upon state sovereignty. The issue in this legislation is not just whether eminent domain should be exercised but who should grant it.

Moreover, this bill transfers the eminent domain power to private companies. Under this bill, it would be the private companies who will determine which routes are in the "public interest."

With eminent domain power, however, a coal slurry pipeline company would have one main goal: the construction of a pipeline at the least cost possible. Such a company would not be concerned about the economic welfare or plans of the landowers and other citizens of the state. It would be simply looking for the shortest, most technically-feasible route. A pipeline company would have no incentive to consider the effects of its actions on future property uses or development (including agricultural uses) and it would not be particularly concerned with the desires of the states involved.

We believe that this legislation is an abrogation of the rights of the individual states to make their own land use and resource decisions. Government is best when it is closest to the people affected. This bill is a clear attempt to construct a chasm between the people affected and what purports to be a "public action" ostensibly in the public's own "best interest." In other words, the people can't be trusted to make their own choices.

Perhaps the argument that federal intervention is needed bears closer scrutiny. If such pipelines have no detrimental effects, why couldn't they be built under existing law? If pipelines cause no difficulties for landowners why wouldn't right of ways be obtainable even without eminent domain? Or if pipelines are simply another means of transporting coal - one that is efficient and environmentally sound—why wouldn't the states with coal resources be interested in providing eminent domain if necessary?

Water Rights

Perhaps one reason some states might not is the effect of coal slurry pipelines on a state's water resources. Under present law, a state would take into account its water needs when considering a request from a coal slurry pipeline company for eminent domain action. A state would feel compelled to consider all effects that a coal slurry pipeline might have.

It is clear to us that this legislation is an attempt to take away the states' rights to control water. In view of recent court decisions which nullified state water export laws, a state would certainly be hampered in denying water rights to pipeline companies.

The pipelines would use immense amounts of water. Most of the coal slurry pipelines now contamplated would take water from areas where water is now scarce and valuable. In effect, the pipelines would divert water from agriculture and other uses to the transportation of coal and do so even though there are alternative means of transporting such a commodity.

Water is our most precious resource. There are numerous studies indicating that our water tables are dropping and that we are facing shortages with severe impacts upon agriculture and other uses. Does it make any sense to use water for transportation if that results in higher food prices, higher costs to water consumers, and increased government expenditures on water supply measures?

We find it inconsistent to be considering the export of water out of water-short areas via coal slurry pipelines while at the same time consideration is being given to the expenditure of billions of federal dollars to transport water into these same areas.

Increased Costs of Shipping

Coal slurry pipelines are not common carriers. It would transport only one thing: coal (and water). By diverting coal from the railroads, it would increase the rail costs of transporting other products including agricultural products. If the slurry pipelines skim off the high-volume, most profitable traffic, then other rates are bound to go up, particularly considering the fixed costs that the railroads have. The Office of Technology Assessment has concluded that there is sufficient rail capacity to keep up with coal production. In the end, this legislation will enrich the pipeline builders at the expense of the farmer, the rail shipper, and, most important, the American consumer.

We urge this committee to reject this legislation.

STATEMENT
by
KENNETH HOLUM
GENERAL MANAGER
WESTERN FUELS ASSOCIATION, INC.
to the
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
MARCH 14, 1983

Mr. Chairman. Western Fuels Association, Inc., is pleased that your Committee has begun work so expeditiously this year on the coal pipeline legislation which was cleared by you in 1982 but proceeded no further. Speaking for my organization of consumer-owned members -- rural electric generation and transmission cooperatives and municipal electric utilities -- I fully endorse the effort to grant the right of eminent domain, under carefully defined conditions, to the prospective builders of coal slurry pipelines. We support S. 267 and hope that this Committee will move to approve it without undue delay.

I am Ken Holum, general manager of Western Fuels. In both this capacity for the past nine years and as a consultant to rural electric G&T cooperatives prior to that, I have had considerable experience in working with railroads to develop shipping arrangements and cost structures for the movement of coal from mine to power plant. It has not always been a pleasant exercise, and both I and the Board of Directors of Western Fuels have come to the conclusion that the present railroad monopolies will not price the hauling of coal to its captive customers fairly until there is some competition. Coal slurry pipelines offer the best prospect for providing that competition.

There is no valid or logical reason to permit the railroads to continue their stranglehold on the introduction of competition into a clearly monopolized field. They sought and were given a large measure of deregulation by the 4-R Act (Railroad Revitalization and Regulatory Reform Act of 1976) and its second-generation legislation, the Staggers Rail Act of 1980. And what they weren't given by Act of Congress, they have been handed on a silver platter by a palpably withdrawing Interstate Commerce Commission.

Only the nation's consumers have been ignored in the determination of railroad coal hauling rates -- the consumers of coal and the consumers of the electricity which is generated using coal as a fuel. And who isn't affected when electric service costs go up? The time is overdue for the needs of consumers to be given a chance for equal treatment.

Allow me a few moments to explain about our organization. Western Fuels Association, Inc., is a non-profit, cooperative organization with more than 30 members scattered across the country from the Rocky Mountains area of the Northwest to North Carolina and Florida in the Southeast -- and beyond to Puerto Rico. However, our membership is generally concentrated in the Mountain States and the Midwest, extending from the Canadian border to the Mexican and from Michigan south to Louisiana.

Our primary responsibility is to develop supplies of coal as fuel for our members' electric generating stations and to arrange for its transportation from mine to point of use. We have developed two mines of our own, one of which will not reach the production stage until later this year. The bulk of our commitments, however, will be supplied from mines owned and operated by major energy companies in the Powder River Basin of northeastern Wyoming.

Western Fuels provided its members with about eight million tons of coal last year. This total will increase to 10 million tons this year and could double in 1985 if the economy fully recovers.

We ship coal over the trackage of several railroads, principally among them, the Burlington Northern, but including the Missouri-Pacific and the Illinois Central Gulf. Soon the Santa Fe will be added to that list. We move coal from the Powder River Basin to generating stations in the southeastern part of Wyoming (the Laramie River Station, owned by the Missouri Basin Power Project, near Wheatland) and in Kansas City, Kansas (the Board of Public Utilities/ Nearman Creek Station), and from our Brushy Creek Mine in Southern Illinois to two generating stations of the Board of Public Utilities, Kansas City, Kansas, the Quindaro and the Kaw, and to the Sikeston Station of the Sikeston, Missouri Board of Municipal Utilities.

As examples of how railroad freight rates have increased during a period spanning the passage of the Staggers Act: In the slightly less than four years since we began shipping coal to the Laramie River Station, rates have increased from $3.04 per ton to $4.34, in increase of $1.30 -- an increase which boosted fuel costs for that station by more than $4 million last year; to the Nearman Station, from $10.40 per ton to $15.75; from Brushy Creek Mine to Kansas City, from $9.90 to $12.13 per ton, and from

Brushy Creek to Sikeston, from $6.15 to $8.07. In every case, the railroads quoted lower rates when we were in the planning stage.

Last year, for the 6.7 million tons approximately for which transportation was our responsibility, the cost was $38.5 million.

We are concerned that the increases to date will appear mild when the railroads are able to exercise the freedoms from constraint provided in the recent ICC action. And we are more concerned that with rapidly rising transportation costs, this plentiful and secure domestic energy resource may begin to be priced out of the market.

Like everything else in recent years, the costs to utilities of providing electric power have been rising. This has required rate increases, which, in turn -- encouraging the conservation efforts of consumers, as it does -- reduces demand for electricity. Fixed costs, including interest on capital, continue, thus additional rate increases become necessary.

At the risk of sounding a bit out of touch with reality, let me state that Western Fuels believes that the nation's railroads, electric utilities, and the coal industry are mutually dependent upon one another. If one of them profits at the expense of the other two, all wind up as losers -- as does the consuming public. It would be helpful if the federal government would provide some leadership instead of adding to the problem. We should all have the same goal -- holding down the costs of finished products (which, of course, includes electricity to the consumers at the end of the line). And, we might if the nation had a realistic energy policy

In the event that my meaning is not clear, a national energy policy includes a national transportation policy, involving highways, trucks, railroads, barges, high voltage transmission lines, and slurry pipelines. We need them all. Those in the supply and service areas need to make profits. But when one gets greedy and grabs for far more than its share, there must be some help from the government to equalize the equation -- national policy or no.

I would like, for a moment, to discuss relationships with the Burlington Northern which dominates the coal-hauling business in the Gillette, Wyoming, area of the Powder River Basin.

With the BN's attitude toward agreements affecting other shipments to Western Fuels members where letter contracts have been changed unilaterally, Western Fuels has been forced to sue in an effort to require BN to adhere to agreements arrived at in good faith, or so we thought. We are attempting to stop the railroad from undermining, through precipitous escalation, the rates it had assured its customers it would maintain.

This is not a pleasant prospect, for the costs of litigation against the railroad must be passed on to the electrical consumers as a cost of doing business on their behalf.

Western Fuels is not alone. Others have also felt compelled to sue the Burlington to prevent it from breaking agreements which were an important factor in site planning for the power plants to be served. Western Fuels has also charged the BN with monopolization of coal transportation from the Powder River Basin in creating and exploiting reliance interests of the shippers and stifling potential competition. (A copy of our complaint is attached.)

What Western Fuels is doing by its resort to the courts is trying to break up this monopoly. It should not be up to the shippers to do that. The lack of government action has forced us to carry the burden of protecting the public from overcharging, and we urge the Congress to pass S. 267, H.R. 1010, or a compromise between the two, thus creating the possibility of competition -- as one step toward correcting the present monopoly situation.

The coal pipeline issue has been clouded over the years by irrelevancies conjured and disseminated by the railroad industry. Congressional Committees have heard those largely spurious arguments in the past and have dismissed them. Those issues of substance have been answered by perfecting amendments in this and other Committees when the legislation was last considered.

Our hope is that the busy members of this and the other committees with jurisdiction will not waste their time wrestling with these same old bugaboos.

We believe that the anticipated growth in production and use of coal between now and the end of the centruy will be more than adequate to provide growth in jobs for railroad workers and in tonnage hauled and subsequent profits for the railroads -- over and above any small percentage of annual coal production which may be moved by the pipelines. Also, state water rights have been adequately protected -- enhanced, in fact.

The overwhelming bulk of coal producers and utility and industrial users will always be captives of one or another of the nation's prosperous railroads, which can set the price for hauling coal as high as they like, in a true monopoly situation. The pipelines will provide competition in a few areas, but when they finally are able to begin construction under conditions laid down by this legislation, the railroads may again set more realistic rates for us all.

To Western Fuels, there is only one real question to be resolved before the Congress completes favorable action on this legislation:

Will a monopoly be permitted to continue determining the price the citizens of this nation must pay for one of the basic necessities of life and industry -- electricity?

Coal prices are stable or lower today than in the recent past, but transportation prices are skyrocketing.

Under the Staggers Act and its convoluted interpretations by the Interstate Commerce Commission, only Congress can right this distorted situation.

A regulatory agency, with responsibility for furthering the public well being, protecting it from unjustifiable costs, seems to be determined to serve only the railroads, giving them everything they want -- and more. If the ICC action is not successfully challenged in the courts and, thus, becomes final, all rate regulation on the railroads will have been effectively eliminated.

Faced with the glamorization of the word "deregulation," a few years ago, the media, federal administrators, and the lawmakers alike seemed to forget that regulation was instituted in the first place to prevent or control the abuses which result from monopoly situations.

Regulation wasn't bad; bad regulation was the problem, and still is, and the public is powerless unless its Senators and Representatives in Congress recognize this threat and correct it.

There is nothing politically partisan in what I am saying. Interstate Commerce Commissioners appointed by presidents of both parties have been falling over themselves to give the railroads what they ask -- to deregulate completely in spite of promises of protection to the captive shippers.

As you no doubt have heard from other witnesses, by means of its own esoteric definitions and findings, the Commission has enabled the railroads to increase rates by 15 percent a year -- over and above any escalation for inflation, year after year after year. If the railroads use this power (and what railroad management could convincingly explain to its board of directors and stockholders why it doesn't take full advantage of this ruling?) present high rates for hauling coal can be doubled in five years.

Let me discuss briefly some of the aspects of this split, 3-to-2 ruling. First, because if those who dissented had prevailed, the decision would have been worse from the standpoint of the producers and users of coal and its most important product from our standpoint -- electricity.

Second, because it is doubtful that very many people -- in government and out -- can understand the English language as used by the Commission.

Look at these terms of the art which are involved in the ICC action on what is known as "Ex Parte No. 347 (Sub-No. 1), COAL RATE GUIDELINES -- NATIONWIDE":

"Revenue Adequacy" -- It is unlikely that any major railroad will ever achieve revenue adequacy under the ICC definition. We are told that initial investment is not considered, that to achieve revenue adequacy coal freight rates must produce revenue high enough to cover system replacement costs in current dollars, with financing at current interest rates. The new freedom in setting rates would be "limited" to "revenue inadequate" railroads -- which means all of those Western Fuels uses or expects to use.

"Stand Alone Costs" -- As the ICC defines it, "stand alone" means that freight charges can be based on what it would cost the shipper to build and operate a railroad strictly for his own use. Far-fetched as it may sound, the basis for this term is the supposition that the railroad gets no other revenue -- that no one else is shipping anything over their tracks.

Or, as one coal trade newsletter put it: "Stand-alone represents the long-term costs a single shipper would face in establishing its own exclusive rail line."

There is hope if we can get back to some basics. Our economic system was founded on private enterprise and prides itself -- and rightly so -- that the system is superior because it is competitive, not monopolistic. New ideas and concepts are allowed to emerge and succeed on the basis of their merit -- or fail. The coal slurry pipeline companies ask only that this idea be given the opportunity to prove that it is competitive. They are not asking for a handout or a government subsidy.

We believe that if potential coal pipelines can be freed to acquire the necessary rights-of-way as provided by S. 267, there will be meaningful competition to the monopolies that now control coal transportation in this country.

In a supposedly free market, competitive economy, there is something repulsive about the all-out efforts of one part of the transportation industry to freeze out a potential competitor. As the Chairman of the House Committee on Interior and Insular Affairs, Morris K. Udall has said, energy can be transported in the United States by many modes. Oil and natural gas can move by pipeline across state lines, railroad lines, and barge lines; so can coal if it is used to generate electricity in mine-mouth plants and transported by extra-high voltage transmission lines. But because the railroads lie everywhere athwart the routes of potential coal slurry pipelines which lack a uniform power of eminent domain, they have been able to block development of a competitive mode. This unrestricted power they have can be tethered a bit by enactment of this legislation.

It is the hope of Western Fuels Association and its rural electric and municipal utility members that this Committee and the full Senate will speedily enact this legislation. Thank you.

# # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF WYOMING

WESTERN FUELS ASSOCIATION, INC.)
)
Plaintiff,)
)
v.) Civil Action No. C82-0443
)
BURLINGTON NORTHERN RAILROAD)
COMPANY)
)
Defendant.)

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

Western Fuels Association, Inc., states the following as its complaint against Burlington Northern Railroad Company:

1. This is an action for declaratory and injunctive relief and damages brought by Western Fuels Association, Inc. ("Western Fuels") against Burlington Northern Railroad Company ("BN"). Western Fuels complains that BN has breached its contracts with Western Fuels whereby it agreed to carry coal from certain mines in the Powder River Basin of Northeastern Wyoming to Moba, Wyoming and to Nearman, Kansas. Western Fuels, in addition, complains that BN is now estopped from denying the

existence of said contracts, and that BN intentionally represented to Western Fuels that it intended to enter into binding relationships, which representations were untrue. Western Fuels, finally, complains that BN has monopolized the carriage of western, low-sulphur coal in unit trains from points in Northeastern Wyoming to other points in Wyoming and the central part of the United States, and that BN and others have contracted, combined and conspired to restrain the trade in the carriage of that coal.

Jurisdiction

2. This Court has jurisdiction pursuant to 15 U.S.C. § 15, 28 U.S.C. § 1331(a), 1332(a)(1) and 1337(a), and 49 U.S.C. § 10713. Western Fuels seeks declaratory and injunctive relief in accordance with 15 U.S.C. § 26 and 28 U.S.C. §§ 2201 and 1651.

Parties

3. Western Fuels is a not-for-profit fuel supply cooperative incorporated under the laws of the State of Wyoming. It purchases and/or mines coal on behalf of its members, including those organizations that own and operate the Laramie River Station near Wheatland, Wyoming, the Board of

Public Utilities of Kansas City, Kansas, and the Holcomb Station near Holcomb, Kansas. Its principal place of business is located at 1225 19th Street, N.W., Suite 700, Washington, D.C. 20036.

4. BN is a railroad corporation incorporated under the laws of the State of Delaware with its principal place of business located at 176 East Fifth Street, St. Paul, Minnesota 55101. BN does business in the State of Wyoming.

Facts

5. Members of Western Fuels own and operate the Laramie River Station at Wheatland, Wyoming, the Nearman Creek Station at Nearman, Kansas, and the Holcomb Station at Holcomb, Kansas. The three stations are electric generating stations that burn low-sulphur coal from the Powder River Basin in Wyoming in order to generate electricity for consumers in the Rocky Mountain and Midwestern States. A substantial amount of the output from the Laramie River Station is expected to be consumed by rural and municipal consumers within the State of Wyoming.

6. Under the terms of Western Fuels' Articles of Incorporation, By-laws and certain agreements, Western Fuels has obligations to the owners of the Laramie River Station, the

Nearman Creek Station, and the Holcomb Station to mine and/or purchase and to ship coal for use in the three power plants. Western Fuels presently ships substantial quantities of coal to the Laramie River and Nearman Creek Stations. Western Fuels expects to begin shipments of coal to the Holcomb Station on or about February 26, 1983.

7. The cost of transportation of coal from the Powder River Basin to the Laramie River Station was one of the important considerations involved in the site selection process for the Laramie River Station. In the early and mid-1970's, officials of Western Fuels or its predecessor, on behalf of and at the request of the owners of the Laramie River Station, conducted extensive discussions with officials of BN concerning the tariffs that would be established for the transportation of coal from the Powder River Basin to Southeastern Wyoming for the Laramie River Station and to Kansas for the Nearman Creek Station. In 1973, BN furnished Western Fuels or its predecessor with a "planning rate" of $1.19 per ton of coal to be transported from the Powder River Basin to Wheatland, Wyoming. This "planning rate" was communicated to the owners of the proposed Laramie River Station.

8. In the latter part of the year 1978, after the members of Western Fuels had expended a considerable sum of money on the design and construction of the Laramie River Station, BN notified Western Fuels that the "planning rate" was no longer in effect and that the original rate of $1.19 per ton was not a "firm commitment."

9. In the latter part of the year 1978 and in 1979, BN officials and Western Fuels negotiated the terms of new tariffs for the shipment of coal from the Powder River Basin to both Wheatland, Wyoming and Nearman, Kansas. Between December, 1978 and December, 1979, Kenneth Holum, General Manager of Western Fuels, Norman Lorentzsen, President of BN, and A. E. Michon, a Vice President of BN, through an exchange of correspondence and documents, entered into contracts between Western Fuels and BN establishing the rates to be charged for the hauling of the coal to the two station, together with agreed escalation in the event of increased costs.

Count I - Breach of Contract

10. Western Fuels incorporates by reference the allegations set forth in Paragraphs 1 through 9 inclusive of this Complaint.

11. On or about the 2nd day of April, 1979, BN and Western Fuels entered into a contract for the carriage of coal from points in the Powder River Basin to the Laramie River Station at Wheatland, Wyoming. On or about the 30th day of November, 1979, BN and Western Fuels entered into a contract for the carriage of coal from the Powder River Basin to the Nearman Creek Station at Nearman, Kansas.

12. Officers or agents of BN drafted and prepared the offers and terms contained within the correspondence pertaining to both the Moba and Nearman movements.

13. Since 1979 and in accordance with the contracts, BN has hauled coal from the Powder River Basin, as follows:

To Moba, Wyoming:

789,837.70 tons in 1979

2,349,576.95 tons in 1980

3,022,311 tons in 1981

3,460,633 tons in 1982 (prior to Oct. 1)

To Nearman, Kansas:

88,988.85 tons in 1980

270,369 tons in 1981

490,346 tons in 1982 (prior to Oct. 1)

In accordance with the contracts, Western Fuels paid BN approximately $35,676,531 for the carriage of coal to Moba and approximately $11,138,508 for the carriage of coal to Nearman during the foregoing year.

14. In relevant parts, the BN-Western Fuels contracts provide that the tariffs shall be escalated "on July 1 of each year to the previous year's index level." This annual escalation is computed on the basis of 80 percent of an index compiled by the Association of American Railroads.

15. BN has informed Western Fuels that on or about the 22nd day of October, 1982, it began to charge rates for the two

movements of coal that are in excess of the rates provided for in the BN-Western Fuels contracts. BN, on information and belief, has filed tariffs with the Interstate Commerce Commission and with the Wyoming Public Service Commission which, as of late October, 1982, were approximately 2.9 percent above the rates authorized by the BN-Western Fuels contracts. Western Fuels estimates that the excess and unauthorized transportation costs on the October 26, 1982 billing on the two movements of coal (reflecting only a few days under the higher rate) amounted to approximately $11,000.00. Western Fuels estimates that the excess and unauthorized transportation costs on the two movements will amount to more than $973,000 during 1983. BN proposes to continue to impose increased and unauthorized escalation charges during the term of the BN-Western Fuels contracts, which run for a period of twenty (20) years.

16. In accordance with the BN-Western Fuels contracts, Western Fuels is committed to ship the following tonnages in the following years:

To Moba:

5,525,000 tons January 1, 1982 to December 31, 1982 and each twelve (12) month period thereafter commencing with January 1 of each year and ending with December 31 of each year.

To Nearman:

650,000 tons January 1, 1982 to December 31, 1982.

700,000 tons January 1, 1983 to December 31, 1983 and each twelve (12) month period thereafter commencing with January 1 of each year and ending with December 31 of each year.

for a contract term of twenty (20) years which will result in damages to Western Fuels for breach of contract substantially in excess of $10,000.00.

Count II - Estoppel

17. Western Fuels incorporates by reference the allegations contained in Pargraphs 1 through 16 inclusive of this Complaint.

18. In 1973, through its agents and representatives, BN represented and promised that a reasonable "planning rate" for the carriage of coal from the Powder River Basin in Wyoming to the Laramie River Station would be $1.19 per ton. The "planning rate" was submitted to the owners of the proposed Laramie River Station. In 1978-1979, through its agents and representatives, BN represented and promised that it would haul coal from the Powder River Basin in Wyoming to the Laramie River Station in the specified tonnages for a term of twenty (20) years for a certain rate, with a certain escalation. In 1979, through its agents and representatives, BN represented and promised that it would haul coal from the Powder River Basin in Wyoming to the Nearman Creek Station in specified tonnages for a certain rate, with a certain escalation. BN expected, or reasonably should have expected, that its representations and promises to Western Fuels would induce Western Fuels and Western Fuels' members to rely on those

representations and promises and thus to ship coal over its railroad in accordance with the terms of the rates submitted.

19. Western Fuels and Western Fuels' members in good faith relied upon the representations made to it, in writing, by BN. Western Fuels and its members were induced to action and forbearance, to their detriment and damage.

20. Western Fuels has no adequate remedy at law. Injustice can be prevented and Western Fuels' rights preserved only if the Court enjoins BN from departing from the express provisions of the two foregoing contracts and the imposition of rates in excess of those provided for in the contracts.

Count III - Misrepresentation

21. Western Fuels incorporates by reference the allegations set forth in Paragraphs 1 through 20 inclusive of this Complaint.

22. BN made reprsentations of facts to Western Fuels, both when it supplied the "planning rate" in 1973 and again, in 1978-1979, when it purported to negotiate with Western Fuels over the tariffs to Moba, Wyoming, and Nearman, Kansas. BN represented that it intended to compute the tariffs and the

tariff escalators in a certain and definite manner. BN represented that it intended to deliver stated quantities of coal to Moba, Wyoming and to Nearman, Kansas.

23. On information and belief, the representations that BN made in 1973 and 1978-1979 concerning the tariffs and deliveries were material, were false and were known to be false by BN.

24. The representations that BN made in 1973 and again in 1978-1979 were made prior to the execution, by Western Fuels, of what purported to be tariff contracts or binding commitments by the BN to carry coal for the rates and escalation formulae specified in each instance. The representations were made with the present intent of inducing Western Fuels to believe that the "planning rate" was reasonable, and that the rates would be reasonable, and to agree to tariff contracts.

25. Western Fuels, reasonably believing the BN representations, relied on the false representations. Western Fuels has been damaged by the reliance, as alleged and set forth in Paragraphs 1 through 16 inclusive of this Complaint.

26. On information and belief, it has been the practice of BN, since 1970, to negotiate freight rates with other coal shippers, leading the shippers to believe that contracts were consummated or that binding commitments by the BN had been made to carry coal at specific rates, escalated in accordance with specific formulae. Since 1979, it has been the practice of BN to repudiate the agreements, as it has done in the case of Western Fuels, in order to escalate the rates above the escalation authorized by the contracts.

27. BN's activities as alleged herein amount to aggravation, outrage, malice and willful and wanton misconduct.

Count IV - Monopolization

28. Western Fuels incorporates by reference the allegations contained in Paragraphs 1 through 27 inclusive of this Complaint.

29. BN has market power by virtue of its sole rail access to a large portion of the coal deposits in the Powder River Basin.

30. The product market is the carriage of low-sulphur, EPA compliance, subbituminous coal from the Powder River Basin.

31. The geographic market is the carriage of that coal from mines in the Powder River Basin to electric generation stations in Mountain and Midwestern States of the United States.

32. BN has monopoly power or, through the use of its market power, is attempting to obtain and to maintain monopoly power within the geographic and product markets.

33. On information and belief, BN made the representations, as herein alleged, to Western Fuels and to the members of Western Fuels in order to cause Western Fuels and its members to rely on BN's services. The induced reliance was for the purpose of excluding and avoiding competition in the relevant product and geographic markets and exploiting the BN's monopoly power in the relevant markets.

34. On information and belief, BN has made promises and representations to shippers of coal, other than Western Fuels and Western Fuels' members, but within the relevant product and geographic markets, in order to cause those shippers to rely on BN's services. The induced reliance was for the purpose of avoiding competition in the relevant product and geographic markets and exploiting BN's monopoly power in the relevant markets.

35. On information and belief, BN has acted to exclude competition in the carriage of coal from the Powder River Basin. BN has fought access by other railroads to the Powder River Basin coal fields. BN has fought access by coal slurry pipelines to the said coal fields.

36. On information and belief, BN has taken other actions in order to exclude competitors in the carriage of coal from the Powder River Basin.

37. On information and belief, BN is either breaching or otherwise avoiding the promises that it made to Western Fuels, Western Fuels' members, and others regarding the tariffs and terms of BN's carriage of coal from the Powder River Basin. BN is breaching or avoiding its obligations, as a matter of company policy, solely to exercise its monopoly power with the intent to exclude competitors and to exploit BN's monopoly power in the relevant markets.

38. On information and belief, BN has taken the actions described in Paragraphs 33 through 37 inclusive of this Complaint because of its anti-competitive and monopolistic intent to secure higher than free market rates for the carriage of

coal. BN's entire pattern of conduct evinces its sole purpose and intent to willfully, unlawfully, unfairly and consciously to acquire, maintain and exploit its monopoly power.

39. The actions and intent described in Paragraphs 29 through 37 inclusive of this Complaint have injured and will injure Western Fuels in its trade and business by causing Western Fuels to pay unreasonable and unlawful prices for the transportation of coal. On information and belief, BN, unless restrained, will continue with the actions and intent described in Paragraphs 29 through 37 inclusive of this Complaint. The actions and intent occurred in interstate commerce in that they affected the rates and practices for the interstate transportation of coal. The actions and intent constitute a violation of the Sherman Act, 15 U.S.C. § 2.

Count V - Monopolization

40. Western Fuels incorporates by reference the allegations contained in Paragraphs 1 through 39 inclusive of this Complaint.

41. The actions and intent described in Paragraphs 29 through 38 of this Complaint have injured Western Fuels in its

trade or business and constitute a violation of the Wyoming Constitution, Article 1, Sec. 30, and applicable provisions of Wyoming law.

Count VI - Restraint of Trade

42. Western Fuels incorporates by reference the allegations contained in Paragraphs 1 through 41 inclusive of this Complaint.

43. On May 22, 1975, BN and Chicago and North Western Transportation Company ("North Western") executed an agreement concerning the joint construction, ownership and operation of a new rail line, approximately 116 miles in length, to be built in Eastern Wyoming. The new rail line, called the "joint line," would extend from Amax Junction, in Wyoming's Powder River Basin, to Shawnee and Orin Junction, Wyoming, where it would connect with BN's and North Western's existing lines. The May, 1975 agreement was supplemented by other agreements in June, 1976, and January, 1978.

44. The May, 1975 agreement provides, inter alia, that both North Western and BN will pay for and have access to the new rail line. The agreement further stipulates that North Western's

access to the new rail line does not extend to the northern nine miles of the new line, which is to be owned solely by BN.

45. The northern nine miles of the new rail line adjoin a substantial number of coal mines, including coal mines -- owned by Sunoco, Shell, Exxon, Kerr-McGee and Mobil -- from which Western Fuels has contracts to purchase large amounts of coal. No rail carrier other than BN provides coal transportation service from the mines located on the northern nine miles of the new, "joint" line. Western Fuels, if it wishes to transport coal by rail, from these mines, has no choice but to ship the coal by BN.

46. The 1975 agreement, by prohibiting North Western's access to these coal mines, denies Western Fuels the benefits of competition from competing rail carriers.

47. On information and belief, BN and North Western continue to act in accordance with the territorial restrictions in the 1975 agreement. These actions damage Western Fuels by causing Western Fuels to pay charges for the shipment of coal substantially higher than the charges that would prevail if the territorial restrictions were not in place.

48. The territorial restrictions contained in the 1975 agreement constitute a division of markets and are thus a contract, combination or conspiracy in restraint of trade. The territorial restrictions occur in interstate commerce in that they affect the rates and practices for the interstate transportation of coal. The territorial restrictions constitute a violation of the Sherman Act, 15 U.S.C. § 1.

Count VII - Restraint of Trade

49. Western Fuels incorporates by reference the allegations contained in Paragraphs 1 through 41 inclusive of this Complaint.

50. Since at least the early 1970's, BN and others have acted to prevent competition in the carriage of coal from coal slurry pipelines. BN and others have acted to prevent entities planning other modes of transportation from entering the coal transportation market. On information and belief BN and others have acted and are acting to prevent Energy Transportation Systems, Inc., and other entities from acquiring the necessary land, permits, water, capital and technology to build an operating pipeline.

51. Since at least the early and mid-1970's, BN and others have met, planned, conspired, combined and agreed with the intent and purpose to prevent competition from coal slurry pipelines.

52. The actions described in Paragraphs 49 through 51 inclusive of this Complaint constitute a contract, combination or conspiracy in restraint of trade. The actions occurred and occur in interstate commerce in that they affect the rates and practices for the interstate transportation of coal. The actions damage plaintiff and the general public, who have been forced and will be forced to pay unnecessarily high prices for the transportation of coal. The contract, conbination and conspiracy constitute a violation of the Sherman Act, 15 U.S.C. § 1.

Count VIII - Discrimination

53. Western Fuels incorporates by reference the allegations contained in Paragraphs 1 through 52 inclusive of this Complaint.

54. The actions and practices described in Paragraphs 42 through 52 of this Complaint show that BN has unfairly discriminated and will unfairly discriminate against Western

Fuels, thus injuring Western Fuels in its trade or business. The actions and practices constitute a violation of Wyoming Statutes § 40-4-101 et seq.

Prayer

Western Fuels prays and demands:

A. That the Court proceed with a trial by jury.

B. That the Court declare that a contract exists between BN and Western Fuels and that BN has breached the same; enjoin any breaches of that contract, and award Western Fuels damages for breach of contract in such amount as shall be shown at trial.

C. That the Court declare that BN is estopped from denying its promises and representations to Western Fuels and Western Fuels' members; enjoin any actions contrary to those promises and representations, and award Western Fuels damages for BN's breach of its promises and representations in such amount as shall be shown at trial.

D. That the Court declare that BN has made false and misleading representations to Western Fuels and Western Fuels' members, and that those false representations were aggravated, outrageous, malicious, willful and wanton; enjoin any actions by BN contrary to its representations; and award Western Fuels its actual damages in such amount as is shown at trial, as well as punitive and exemplary damages in an amount equal to the gain BN has realized as a result of such course of conduct and in an amount required to insure that the public interest is protected.

E. That the Court declare that BN has monopolized the carriage of coal from the Powder River Basin to electric generation stations in the Mountain and Midwestern States; enjoin that monopolization, and award Western Fuels three (3) times the amount of its actual damages as shall be shown at trial.

F. That the Court declare that BN has restrained the trade in the carriage of coal by contract, combination and conspiracy; enjoin that restraint of trade, and award Western Fuels three (3) times the amount of its actual damages as shall be shown at trial.

G. That the Court award Western Fuels the costs and attorneys' fees necessary for the prosecution of this action; and

H. That the Court grant Western Fuels such other and further relief as the Court may deem proper in the premises.

H. That the Court grant Western Fuels such other and further relief as the Court may deem proper in the premises.

Dated this 31st day of January, 1983.

WESTERN FUELS ASSOCIATION, INC.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiffs' Second Amended Complaint For Declaratory and Injunctive Relief and Damages was served by hand, this 31st day of January, 1983, on

Betty Jo Christian
Martin D. Schneiderman
Samuel T. Perkins
Steptoe & Johnson, Chartered
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Washington, DC 20036

And also, by first class mail, postage prepaid, on:

Paul Godfrey
Godfrey & Sundahl
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and

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Charles F. Bolum

STATEMENT OF E. MORGAN MASSEY
PRESIDENT, A.T. MASSEY COAL COMPANY
ON BEHALF OF THE EASTERN COAL
TRANSPORTATION CONFERENCE BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
MARCH 14, 1983

Mr. Chairman and members of the Committee:

My name is Morgan Massey, and I am President of the A.T. Massey Coal Company. I appreciate the opportunity to present this statement on behalf of the Eastern Coal Transportation Conference, an organization of which my company is a member. ECTC is a voluntary association of twenty-two companies, all of which are engaged in the production of coal or own coal reserves on lands located east of the Mississippi River. Our members are basically small to medium-sized coal companies, and through ECTC lend their support to efforts to promote competition in the transportation of Eastern coal for domestic use and export.

My own company is also active in this area, and is pioneering the utilization of coal in slurry form as but one facet of this effort. In a partnership with Florida Power Corporation and Dravo Corporation, the Bartow Generating Station on Tampa Bay has been converted from oil to a coal oil slurry. This unit is successfully burning coal in slurry form on a fully commercial basis in an electricity plant built originally for oil. This is just the first of a number of possible innovations for the use of coal in slurry form as a substitute for foreign oil.

The purpose of this statement is to record the unequivocal support of ECTC for S. 267, The Coal Distribution and Utilization Act of 1983. In my testimony I would like to make three basic points:

- the relationship between transportation costs and the delivered price of coal makes competitive, reasonable rail rates critically important to the interests of Eastern coal producers.
- the Eastern coal transportation market is dominated by carriers which, with the blessing of the ICC, have engaged in market dominant pricing practices. Recent actions of the ICC promise to exacerbate this problem. These practices and the resulting unreasonably high rates can be constrained through competition in the form of coal slurry pipelines.
- the pattern of railroad land holdings in the East coupled with the uncertainties of individual state regulatory policies make the exercise of federal eminent domain authority necessary if rights-of-way for pipeline construction are to be obtained.

I.

It is no secret that the vast majority of Eastern coal mines -- like mines nationwide -- are captive to the railroads. In the case of ECTC, over 85% of our members' mines lack viable transportation alternatives. Even in those instances where a potential shipper could utilize another mode -- for instance, water carriage -- for a portion of a coal movement, transportation out of the mine areas themselves must inevitably be by rail, thus giving the rail carrier control over the shipment at the source. Because shippers have no competitive alternatives when it comes to transporting coal from a member's mine, they are exposed to very high rail rates and market dominant practices with no means of redress through the natural workings of the marketplace.

The ability of a producer to sell his coal is in large part dependent upon the cost to the purchaser of transporting that coal to its end use destination. If transportation charges push the delivered price above the level tolerated by the existing coal market, the producer must either cut his margin or face a loss of business. The railroad, on the other hand, has little or no incentive to reduce its prices, since it faces no competition for the producer's traffic. Even if the carrier's overall revenues decreased as a result of a decrease in traffic, the carrier can be expected to continue to increase its rates so long as net profits -- revenues over costs -- continue to rise. This is normal behavior for a firm enjoying the monopoly power possessed by the Eastern railroads.

It is this interrelationship between transportation costs and delivered coal prices that makes the rail monopoly in the East a matter of such vital concern to coal producers.

II.

There may indeed be a mandate in the law to preserve the viability of the nation's rail system. I submit, however, that nowhere is there a mandate that the railroads' monopoly over coal transportation be perpetuated. Coal transportation in the East is presently dominated by two huge conglomerates. CSX Corporation and the Norfolk & Southern enjoy an oligopoly over the available traffic, and the pricing practices of each have been such as to ensure that the carriers, who bear none of the risks associated with the coal sales business, garner as large a share of the available profit margin per delivered ton of coal as possible without forcing a total shut down of the producers' operations. Even in the current recessionary economy, the railroads' rates and earnings on coal traffic have risen, while many producers have been forced to operate at a break-even level, or even at a loss, just to remain in business and avoid massive worker layoffs.

Contemporaneous with their market dominant pricing practices, the Eastern carriers have employed a number of tactics to solidify and maintain their oligopoly over eastern coal transportation. Disproportionate rates have been maintained to river points in order to discourage use of the barge mode, and ensure that wherever possible Eastern coal moves via all-rail routes. In those instances where the East's third coal carrier, Conrail, has attempted to engage in competitive pricing in order to attract traffic, these efforts have been met by retributive joint rate cancellations and route closings. On all fronts, the dominant carriers have taken steps to perpetuate the absence of effective competition for coal transportation in the Eastern market.

Ideally, Eastern coal shippers and producers should be able to turn to the Interstate Commerce Commission for relief under such circumstances. Unfortunately, however, the Commission has elevated the goal of increased revenues for the railroads to a level of paramount importance, to the exclusion of the equally legitimate interests of captive coal shippers, producers and the public. The Commission has refused to prevent the cancellation of joint rates, even in those instances where such cancellations were shown to be in response to the very competitive innovations Congress hoped to encourage through the Staggers Rail Act of 1980. With respect to reasonable rates on market dominant coal traffic, the ICC's recent Coal Rate Guidelines decision in Ex Parte No. 347 amounts to administrative deregulation of rail pricing on this traffic. Under this decision, and despite the directives of Congress in 1980, the Commission has sanctioned the railroads' looking to market dominant coal traffic for recovery of their entire systemwide revenue "shortfalls". The only "constraint" placed on future rate increases is that they not exceed 15% per year after inflation, and do not push rates to levels higher than the costs to a shipper of building its own railroad. To the extent that it had not already done so in individual rate cases, the Commission has now clearly declared open season on captive coal traffic.

As if that is not enough, one week after its Coal Rate Guidelines decision the ICC announced it had voted to wholly exempt the transportation of export coal from Commission regulation, thereby undermining the few protections which still existed for export coal producers and shippers. Unless this Congress acts to facilitate the introduction of competition in the transportation of Eastern coal, the producers have nothing to look forward to for effective long term relief from the oppressive market conditions which presently exist. Coal pipelines would help provide that relief.

The benefits to be gained by producers from the construction of coal slurry pipelines are substantial. The competitive pressure on existing rail carriers should operate to stabilize transportation costs in affected areas, making U.S. coal more competitive with other fuels domestically, and with coal from other countries in the export market. Further, the presence of coal slurry pipelines will act to expand coal markets. By forcing a positive rate response from the railroads, pipelines will encourage coal use which is presently constrained by inordinate transportation costs. (For example, the presence of the proposed Coalstream Pipeline in the East can be expected to increase coal utilization in Georgia and Florida, resulting by 1990 in an increase in demand of over 17 million tons per year over and above the projected demand in the absence of the pipeline. Exports could also be expected to rise, with up to 20.5 million tons moving through South Carolina and Georgia ports alone in 1990. The expanded market would in turn spark an increase in coal production, generating higher sales revenues and over 5,000 additional jobs for coal miners).

Moreover, competition from coal pipelines would help to reduce reliance on the vagaries of rail rate regulation by the ICC, and would enable that agency to marshal its limited resources to concentrate on those areas where, despite the availability of pipelines, effective competition did not exist.

IV.

While there is currently no law on the books which prohibits the construction of a coal slurry pipeline, as a practical matter this mode will be wholly unavailable in the East until Congress takes action of the type proposed in S. 267. In the East, massive railroad land holdings in those areas critical to mine and destination access prevent the acquisition of needed rights of way. Further, because title to this land is held in fee simple, even if one had the time and money to emulate the ETSI experience in the west and seek to obtain the necessary rights in court, every day and every dollar would be wasted.

The use of eminent domain to facilitate innovations in interstate transportation is nothing new. Both the railroads and the natural gas pipeline system were given the very same authority that coal slurry pipelines now seek. As in the case of railroads and natural gas pipelines as well, the grant of eminent domain must be federal. Interstate commerce is a matter committed to Congress by the Constitution of the United States, and the uncertainties of individual state regulatory procedures and political processes, and the lack of the necessary statutory bases in some areas, makes dependence upon individual state action impractical and unwise from a national policy standpoint.

Slurry pipelines can provide a sorely needed competitive alternative to the rail transportation of coal. In the East, the critical importance of such competition cannot be overstated. S. 267 is a significant step toward this goal, and it is for this reason that the Eastern Coal Transportation Conferance fully supports its enactment.

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